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IN THE

Supreme Court of the United States

DAVID WISNIEWSKI, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PETITIONER

v.

RODALE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Third Circuit affirmed the district court's holding that there is no implied private right of action under 39 U.S.C. § 3009, which prohibits the sending, billing for and/or collecting on merchandise without first obtaining the express request or consent of recipients. The statute specifically provides that recipients "shall have the right" to keep unsolicited merchandise "without any obligation whatsoever" to the sender. The rights-creating language in the statute is phrased in mandatory terms, with a clear focus on the persons benefited, as opposed to the persons regulated. While this type of statutory language has been traditionally found to imply Congress's intent to create a private cause of action, the Third Circuit gave it weight only in determining whether Congress intended to create private rights, but believed that separate evidence is required to show Congress's intent to create a private remedy.

The question presented for review:

Whether the rights-creating language of a statute, phrased in terms of the persons benefited with an unmistakable focus on the benefited class, is still "the most accurate indicator of the propriety of implication of a cause of action," *Cannon v. University of Chicago*, 441 U.S. 677, 692 n. 13 (1979), which may itself establish Congress's intent to create a private right of action as it did in *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11 (1979), or whether the Third Circuit decision in *Wisniewski v. Rodale, Inc.*, 510 F.3d 294 (3d Cir. 2007) (App. 1a) is correct in interpreting this Court's decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001) as having changed the test for determining implied right of action

cases such that rights-creating language in a statute is no longer accorded great weight and can no longer itself fairly imply statutory intent to create a private remedy?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 510 F.3d 294 (3d Cir. 2007). (App. 1a) The opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 406 F.Supp.2d 550 (2005). (App. 45a)

JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit, affirming the district court's judgment, was handed down on December 13, 2007. A timely petition for rehearing en banc was denied on January 24, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 39 United States Code, Section 3009.

Mailing of Unordered Merchandise.

(a) Except for (1) free samples clearly and conspicuously marked as such, and (2) merchandise mailed by a charitable organization soliciting contributions, the mailing of unordered merchandise or of communications prohibited by subsection (c) of this section constitutes an unfair method of competition and an unfair trade practice in violation of section 45(a)(1) of title 15.

(b) Any merchandise mailed in violation of subsection (a) of this section, or within the

exceptions contained therein, may be treated as a gift by the recipient, who shall have the right to retain, use, discard, or dispose of it in any manner he sees fit without any obligation whatsoever to the sender. All such merchandise shall have attached to it a clear and conspicuous statement informing the recipient that he may treat the merchandise as a gift to him and has the right to retain, use, discard, or dispose of it in any manner he sees fit without any obligation whatsoever to the sender.

(c) No mailer of any merchandise mailed in violation of subsection (a) of this section, or within the exceptions contained therein, shall mail to any recipient of such merchandise a bill for such merchandise or any dunning communications.

(d) For the purposes of this section, "unordered merchandise" means merchandise mailed without the prior expressed request or consent of the recipient.

STATEMENT

This case raises important questions as to what evidence may sufficiently demonstrate Congress's intent to create a private remedy. Respondent Rodale, Inc. engages in a marketing practice that involves sending, billing for and collecting on merchandise without first obtaining the express request or consent of recipients. Section 3009(a) of the Postal Reorganization Act declares the practice illegal and § 3009(b) provides that recipients "shall have the right" to keep unsolicited merchandise "without any

obligation whatsoever" to the sender. 39 U.S.C. § 3009. The statute also specifically requires that mailers clearly and conspicuously inform recipients of their right to retain unsolicited merchandise and prohibits senders from engaging in collection efforts. Petitioner Wisniewski, on behalf of himself and all others who remitted payment to Respondent for unordered merchandise, seeks return of such monies paid to Respondent.

While § 3009 does not expressly provide for a private right of action, the statute bears the hallmarks of this Court's usual test for an implied private right of action. Subsection (b)'s language that recipients "shall have the right to retain, use, discard, or dispose of [unordered merchandise] in any manner he sees fit without any obligation whatsoever to the sender" created new, specific rights for individuals. The statute is phrased in terms of the persons benefited with an unmistakable focus on the benefited class.

The structure and limited history of the statute reflect Congress's dual aims of (1) stopping the unlawful practice and (2) ensuring that recipients do not suffer financial harm from violations of the statute. Consistent with this intent to "control the unconscionable practice of persons who ship unordered merchandise to consumers and then trick or bully them into paying for it," 116 Cong.Rec. at 22314 (June 30, 1970), subsection (a) addresses the former purpose in declaring the practice an "unfair method of competition and an unfair trade practice" under the FTC Act. Subsection (b) is directed towards the latter purpose in giving recipients the right to be free from any obligation to violators of the statute. The FTC had no

power to obtain restitution for recipients who were "tricked or bullied into paying for [unordered merchandise]."

The United States District Court for the Eastern District of Pennsylvania, after certifying a class of recipients of Rodale's books, granted summary judgment for Respondent, holding that there is no implied private right of action under § 3009. (App. 45a) On appeal, the Third Circuit Court of Appeals affirmed in a 2-1 decision. (Sloviter, J. dissenting). (App. 1a) The Majority interpreted *Alexander v. Sandoval*, 532 U.S. 275 (2001) as requiring separate analyses of two distinct legislative intentions, intent to create a private right and intent to create a private remedy. (App. 10a) Under this framework, the Third Circuit confined its analysis of the critical rights-creating language to the former, recognizing the obvious conclusion that such language established Congress's intent to create rights. (App. 11a-12a) With respect to the second inquiry, the Majority stated "...the Court has not provided a test for discerning this intent." (App. 12a) The Majority did not consider Congress's creation of individual rights in § 3009(b) or accord the critical language with any weight in determining whether Congress implicitly intended that those rights be enforceable. (App. 13a) Since § 3009(a) makes reference to the FTC Act, the Majority held that Congress must have intended that the statute be enforced exclusively by the FTC, which had no power to recover monies obtained from recipients in violation of the statute. (*See* App. 13a, 25a)

A timely Petition for Rehearing En Banc was also denied. (App. 62a) This Court should now consider

Petitioner's claim that rights-creating language is still the most accurate indicator of an implied private right of action after *Sandoval*. The Court is now presented with the opportunity to reverse the Third Circuit's opinion in *Rodale*, which conflicts with settled Supreme Court precedent on the standard for determining implied private rights of action and creates a conflict with the Ninth Circuit decision in *Kipperman v. Academy Life Insurance Company*, 554 F.2d. 377 (9th Cir. 1979), which found a limited implied private right of action under § 3009.

REASONS FOR GRANTING THE PETITION

A. The Third Circuit's Decision In *Wisniewski v. Rodale* Is In Conflict With The Ninth Circuit's Decision in *Kipperman v. Academy Life Insurance Company*

There is a disagreement amongst the Circuit Courts of Appeal on whether there is an implied private right of action under § 3009 of the Postal Reorganization Act. The Ninth Circuit Court of Appeals in *Kipperman v. Academy Life Insurance Company*, 554 F.2d. 377 (9th Cir. 1979), held that the language of § 3009(b) implies that beneficiaries of that statute may vindicate their rights in a limited cause of action for, *inter alia*, restitution. (*See also* App. 23a (Sloviter, J. dissenting)) In contrast, the Third Circuit Court of Appeals in this case held that there is no implied private right of action under the statute.

The Third Circuit found *Kipperman* unpersuasive because it was decided prior to this Court's decisions that "restructured the implied private

right of action test to focus solely on legislative intent." (App. 19a) Principally because the Ninth Circuit stated "we believe Congress did not consider the question of a private right of action under § 3009," 554 F.2d at 380, *Rodale* found that *Kipperman* did not find the requisite statutory intent and, thus, would have come out differently today. (App. 19a) *Rodale's* reasoning conflicts with this Court's teaching in *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 18 (1979) ("*TAMA*"), that "the failure of Congress to expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available." *See also Thompson v. Thompson*, 484 U.S. 174, 179 (1988) (Congress's "intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment." (quoting *TAMA*, 444 U.S. 11, 18 (1979))). Moreover, as demonstrated more fully *infra*, *Rodale's* conclusion is based on an erroneous view of the implied right of action test.

B. The Decision Below Incorrectly Fails To Apply This Court's Standard Test For Discerning Implied Private Causes Of Action And Establishes A Standard That De Facto Eliminates The Doctrine

The *Rodale* Majority applied a test for discerning Congress's intent to create a private remedy that neuters the most critical evidence of such intent – Congress's explicit creation of private rights in the statute. This approach conflicts with Supreme Court precedent.

The starting point for interpreting a statute "begin[s] with the language of the statute itself."

Touche Ross & Co. v. Redington, 422 U.S. 560, 568 (1979) (*citing Cannon v. University of Chicago*, 441 U.S. 677, 689 (1979) and others); *see also Alexander v. Sandoval*, 532 U.S. 275, 288 (2001). In *Cannon*, this Court stated

> Not surprisingly, the right- or duty-creating language of the statue has generally been *the most accurate indicator* of the propriety of implication of a cause of action. With the exception of one case, in which the relevant statute reflected a special policy against judicial interference, this Court has never refused to imply a cause of action where the language of a statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case.

441 U.S. 677, 692 n.13 (1979) (emphasis added).

Cannon's reference to the "implication of a *cause of action*" confirms that a statute's right- or duty-creating language is the most critical indicator of *both* a right and a remedy, i.e. together a cause of action. *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11 (1979) ("*TAMA*"), relying on *Cannon*, applied this principle explicitly and held that rights-creating language *itself* can display Congress's intent to create a private remedy. Moreover, it did so in analyzing the language of a statute remarkably similar to § 3009.

In *TAMA*, the Court held that a limited private right of action was properly inferred from statutory language in the text of § 215 of the Investment Advisors Act ("IAA"), which declared certain contracts

in violation of the act void: "In the case of § 215, we conclude that the statutory language itself fairly implies a right to specific and limited relief in a federal court." 444 U.S. at 18. The Court reasoned that by declaring certain contracts "shall be void," Congress manifested its intent that the "legal incidents of voidness" would follow, including, *inter alia*, the ability to sue for restitution. *Id.* at 19. This Court noted that "the federal courts in general have viewed such language as implying an equitable cause of action for rescission or similar relief." *Id.*

The statutes at issue in *TAMA* and *Rodale* are analogous. (*See* App. 15a, 22a (Sloviter, J. dissenting)) In declaring in § 215 of the IAA that "contracts shall be void," Congress gave investment advisor customers the right to be free from any obligation to investment advisors who violate the Act. Congress did the same thing in § 3009(b) when it provided that recipients have the right to keep unordered merchandise "without any obligation whatsoever" to violators. Similarly, in each case, the statutes permit an agency to enforce the provisions prohibiting the unlawful conduct.

The *Rodale* decision is predicated on a misreading of *Alexander v. Sandoval*, 532 U.S. 275 (2001), as having nullified the two principles set forth above from *Cannon* and *TAMA*. First, *Rodale* viewed a "*Sandoval* test" as having emerged, which requires "two steps: (1) Did Congress intend to create a personal right?; and, (2) Did Congress intend to create a private remedy?" (App. 10a) As applied in *Rodale*, this "new test" treats the critical rights-creating language not as the "most accurate indicator" of an implied right of action as in *Cannon*, nor as evidence that could itself

demonstrate legislative intent to create a private remedy as in *TAMA*, but rather confines such evidence to the first issue of whether Congress intended to create rights. (App. 11a-17a) Thus, *Rodale* recognizes the truism that Congress's creation of individual rights demonstrates its intent to create such rights. However, its analysis of intent to create a private remedy does not give any weight to this critical evidence. (App. 12a-17a; *see also* App. 36a, n. 17 ("[The proposition that] demonstrating legislative intent to create a personal *right* eliminates or reduces the need to demonstrate legislative intent to create a private *remedy* [is] inconsistent with our reading of *Sandoval.*") (emphasis in original)).

Focused only on the language in § 3009(a), *Rodale* thus concluded that the reference to the FTC Act creates a strong presumption of exclusive enforcement by the FTC. (*See* App. 13a) However, the reference to the FTC Act in § 3009(a) is logical as that section proscribes conduct of mailers of unordered merchandise, enforcement of which falls on the agency. In contrast, there is no reference to the FTC in §3009(b), which separately creates rights for recipients. The FTC had no power to seek restitution and enforce the rights created in subsection (b). (*See* App. 25a) *Rodale's* conclusion contradicts Congress's intent that recipients not suffer financially from violations of the statute and renders the rights created for recipients meaningless. Moreover, the presumption of exclusive FTC enforcement disregards that private rights of action have been implied from statutes that also provide for agency enforcement. (*See* App. 13a-14a) Indeed, this Court found no presumption of exclusive agency enforcement in the Investment Advisors Act in

TAMA, which, in addition to implying private remedies for aggrieved investors, authorizes the Department of Justice to pursue investment advisors who violate the Act.

Far from undermining *Cannon*, *Sandoval* actually made clear that the most important evidence necessary to establish an implied right of action is still the rights-creating language itself. At the center of *Sandoval* was § 602 of the Civil Rights Act. That section contains no rights-creating language; rather, it directs the Department of Justice to enact regulations to further the purposes of § 601 of the Act, which was previously found to have an implied private right of action for intentional discrimination. The issue for the Court was whether an agency's *regulations* could create a cause of action for acts (disparate impact discrimination) that the statute itself permitted.

Sandoval began its analysis of legislative intent displayed in § 602 by stating, "[I]t is immediately clear that the 'rights-creating' language so critical to the Court's analysis in *Cannon* of § 601 (citation omitted) is completely absent from § 602." 532 U.S. at 288. The Court held that language of § 602 did not display Congress's intent to create a private remedy and rights created in the DOJ regulations could not do so independently. *Id.* at 291. Since § 602 was directed to the regulating agency and did not create personal rights, there could be no implied private cause of action under the statute.

Sandoval found no implied right in the statute there most significantly *because of the absence of rights creating text.* Accordingly, *Rodale* should have

followed *Cannon* and given proper consideration to the strong inferences flowing from § 3009(b)'s language as an indicator of Congress's intent that the rights it created have meaning.

Similarly, *Sandoval* did not undermine *TAMA's* teachings. The test *Rodale* found to have emerged from *Sandoval* is based on a sentence there: "The judicial task is to interpret the statute Congress has passed to determine whether it displays not just a private right but also a private remedy." (App. 9a (quoting *Sandoval*, 532 U.S. at 286-87)) But, the Court in *Sandoval* cited *TAMA* as the authority for that proposition. 532 U.S. at 286, citing *TAMA*, 444 U.S. at 15. Moreover, the Court further confirmed that it was not establishing a new test as interpreted in *Rodale*, stating "... we reach this conclusion applying our standard test for discerning private causes of action...." 532 U.S. at 293.

Given *Sandoval's* context, its citation to *TAMA* and its reference to having applied its "standard test," it is plain that, while there may be circumstances where the creation of rights is not enough as in *Sandoval*, the Court did not create a new test under which rights-creating language may *never* by itself demonstrate Congress's intent to create privately enforceable rights. The rights-creating language in *Sandoval* was insufficient because it appeared in a regulation, not the statute, and it created rights beyond those provided by the statute. *Rodale* was plainly wrong in failing to credit the critical language in 3009(b) as implying Congress's intent to create a private remedy, broadly stating: "As *Sandoval* tells us, creation of a right is not enough to establish Congressional intent to create a

private right of action to vindicate that right." (App. 16a-17a)

Rodale's erroneous reading and application of *Sandoval* establishes a standard that effectively eliminates the doctrine of implied private rights of action. No statute could meet the *Rodale* test, which eviscerates the most powerful expression of Congress's intent to create a private remedy - its own words used in enacting a statute. Secondary, more speculative indications of intent that are considered will never be adequate by themselves. *Rodale* strays far beyond the analysis contemplated by *Sandoval*, which did not *eliminate* implied rights of action all together.

C. *Sandoval* Is Being Misread By Other Courts As Having Eliminated Implied Private Rights Of Action

Other courts have also erroneously interpreted the breadth of *Sandoval's* holding as eliminating implied rights of action. *Walker v. City of Lakewood*, 272 F.3d 1114 (9th Cir. 2001), *cert. denied sub nom.*, 535 U.S. 1017 (2002). typifies the confusion engendered by *Sandoval*'s private remedy language. In *Walker*, a California municipality contested a housing services provider's ability to sue by arguing that it was akin to a challenge under the Housing and Community Development Act, 42 U.S.C. §§5301-5321 (HCDA), a statutory scheme that does not provide expressly for a private right of action. The Ninth Circuit found that the HCDA's failure to provide a remedy did not preclude the housing service provider's prosecution of a claim under another federal statute, which did expressly provide for a private right of action.

Significantly, in reaching this conclusion, *Walker* summarized *Sandoval* as "holding that federal courts may not create private rights of action in statutes *that do not otherwise provide for private suit.*" 272 F.3d at 1126-27 (italics added). *See also Pittman v. Oregon, Employment Department*, 509 F.3d 1065, 1073-1074 (9th Cir. 2007) (Stating that rights-creating language was insufficient for implying private cause of action); *In re Moore*, 310 Bankr. 795, 799-800 (Bankr. N.D.Miss. 2004) (relying on *Sandoval*, court found no private remedy based only on an examination of express statutory provisions).

The confusion about the proper breadth of the inquiry on the private remedy analysis is not an aberration inimical only to federal jurists. Legal commentators have misinterpreted *Sandoval* as in essence holding that private remedies will not be implied unless a statutory scheme *expressly* provides or authorizes them. *See Leading Cases*, 115 Harv.L.R. 306, 506 (2001-02) (" ... the standard applied by the *Sandoval* Court is more akin to a clear statement rule, which demands explicit authorization in the statutory text for a right of action."); *see also Has Sandoval Doomed Private Right Of Action Under The National Historic Preservation Act?*, 16 B.U.Pub.Int.L.J. 73 (2006) ("*Sandoval*...held that a private right of action exists only where there is explicit and unambiguous statutory intent to create one.").

This Court should clarify this important area of implied private right of action jurisprudence.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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No. 06-1305

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DAVID WISNIEWSKI, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED

v.

RODALE, INC. David Wisniewski, Appellant

September 18, 2007, Argued

December 13, 2007, Filed

On Appeal from the United States District Court for the Eastern District of Pennsylvania. District Court No. 03-cv-00742. District Judge: The Honorable Paul S. Diamond.

JUDGES: Before: SLOVITER, SMITH, and WEIS, Circuit Judges. SLOVITER, Circuit Judge, dissenting.

OPINION OF THE COURT

SMITH, *Circuit Judge.*

This appeal requires us to determine whether § 3009 of the Postal Reorganization Act, 39 U.S.C. § 3009 (2000), which regulates the shipment of unordered merchandise, provides an implied private right of action. The District Court dismissed David

Wisniewski's § 3009 claim on the ground that no implied private right of action exists under this statute. Based on our review of the statute and applicable Supreme Court jurisprudence, we will affirm.

I.

This litigation began in February 2003 when then-plaintiff Michael Karnuth sued Rodale, Inc. in the United States District Court for the Eastern District of Pennsylvania, alleging that Rodale violated the Postal Reorganization Act's unordered merchandise statute, 39 U.S.C. § 3009,[1] and various Pennsylvania state laws. Specifically, Karnuth alleged that Rodale sent him books that he had never ordered and demanded payment for them, and that he paid Rodale for one of the books to avoid damage to his credit rating. Karnuth moved to certify the case as a class action on behalf of all those to whom Rodale had sent unsolicited products and payment demands, with a subclass consisting of those who had paid in whole or in part for the unsolicited products. The court denied the motion without prejudice after Rodale alleged that Karnuth had consented to receive the books. *See Karnuth v. Rodale, Inc.*, No. 03-00742, 2003 U.S. Dist. LEXIS 12095 (E.D. Pa. July 2, 2003). After Karnuth filed an amended complaint, the District Court again denied his motion for class certification in March 2005 on the ground that inconsistencies in Karnuth's two complaints could damage his credibility and thereby harm the other class members. *See Karnuth v. Rodale, Inc.*, No. 03-00742, 2005 U.S. Dist. LEXIS 5241 (E.D. Pa. Mar. 30, 2005).

Subsequently, David Wisniewski replaced Karnuth as class representative. Like Karnuth, Wisniewski alleged that Rodale had sent him unsolicited books and that he had paid Rodale to avoid damage to his credit rating. Rodale argued that Wisniewski consented when he sent Rodale an order card that enrolled Wisniewski in a "negative option" plan, under which Rodale would ship books and bill any recipients who did not return the books within a specified time period. Wisniewski responded that the order cards failed to meet objective disclosure standards and thus were inadequate as a source of consent. Without addressing the merits of these claims, the District Court granted class certification in July 2005 with respect to the § 3009 claim and denied certification with respect to the state law claims. *See Karnuth v. Rodale, Inc.*, No. 03-00742, 2005 U.S. Dist. LEXIS 14426 (E.D. Pa. July 18, 2005). Both parties moved for summary judgment on the federal and state claims, agreeing that any ruling would bind only the named parties and not the class. *See Wisniewski v. Rodale*, 406 F. Supp. 2d 550, 553 (E.D. Pa. 2005). In December 2005, the District Court dismissed the § 3009 claim on the ground that this provision does not confer an implied private right of action, and it dismissed the state law claims for lack of jurisdiction. *Id.* at 557-58. Wisniewski timely appealed.

On appeal, the only issue before us is whether an implied private right of action exists under § 3009.[2] Because this is a question of law, we exercise plenary review over the District Court's summary judgment order. *Am. Trucking v. Del. Toll Bridge Comm'n*, 458 F.3d 291, 295 (3d Cir. 2006).

II.

A private right of action[3] is the right of an individual to bring suit to remedy or prevent an injury that results from another party's actual or threatened violation of a legal requirement.[4] Although the legal requirement can be established by a number of sources, our focus is on statutory duties created by acts of Congress. Many federal statutes provide a private right of action through their express terms.[5] Other federal statutes, however, merely define rights and duties, and are silent about whether an individual may bring suit to enforce them. For some statutes in this latter category, courts have held that "implied" private rights of action exist. Since neither party in the present case contends that the text of § 3009 provides an express private right of action, the only question before us is whether the statute confers an implied private right of action.

No consensus exists regarding when the Supreme Court first began recognizing implied private rights of action under federal statutes. In *Cannon v. University of Chicago*, 441 U.S. 677, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979), the majority contends that the Court's "earliest" case recognizing an implied private right of action was *Texas & Pacific Railway Co. v. Rigsby*, 241 U.S. 33, 36 S. Ct. 482, 60 L. Ed. 874 (1916). *See Cannon*, 441 U.S. at 689 (citing *Rigsby*, 241 U.S. at 39).[6] In *Rigsby*, the Court unanimously held that the Federal Safety Appliance acts provided an implied private right of action to an injured railroad employee against his employer. 241 U.S. at 39. Others argue that the idea of an implied private right of action existed in English common law[7] and appeared in early U.S. cases such as *Marbury v. Madison*, 5 U.S. 137, 2 L. Ed. 60 (1803).[8]

At all events, over the past fifty years, the Supreme Court has substantially modified its test for determining whether a federal statute provides an implied private right of action. The Court's opinions have not always announced explicitly when they are overruling (or limiting to their facts) old precedents in this area. Therefore, it can be difficult to discern to what degree the Court has repudiated old tests as opposed to applying them in a different way to different statutes. We trace these changes below, explaining how the implied private right of action test has developed and where we believe it stands today.

A. *J.I. Case Co. v. Borak*

We begin our review with *J.I. Case Co. v. Borak*, 377 U.S. 426, 84 S. Ct. 1555, 12 L. Ed. 2d 423 (1964), because this case exemplifies the Court's older and less restrictive approach to implied private rights of action. In *Borak*, the Court unanimously held that the Securities Exchange Act of 1934 implicitly authorizes a private right of action for rescission or damages to stockholders who alleged that they were injured by a consummated merger authorized with a false or misleading proxy statement in violation of § 14(a) of the Act. *See* 377 U.S. at 428, 435. The Court explained its holding by emphasizing that "it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." *Id.* at 433. Based on language in § 14(a) explicitly granting the Securities and Exchange Commission ("SEC") the authority to make rules "in the public interest or for the protection of investors," the Court deemed "the protection of investors" to be among the section's primary purposes. *Id.* at 432. Noting that the SEC

admits that it does not have enough time to examine every proxy statement for false and misleading statements, the Court stated that private enforcement is a "necessary supplement" to the SEC's efforts to protect investors. *Id.* at 432-33. Finally, the Court asserted that a federal right of action was necessary because state law might not be adequate to protect the federally-created "rights" in the statute. *Id.* at 434-35. At no point in its opinion did the *Borak* Court purport to discern Congress's intent regarding a private right of action (as opposed to Congress's general purposes in enacting the statute).

B. *Cort v. Ash*

The Supreme Court's unanimous opinion in *Cort v. Ash*, 422 U.S. 68, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975), replaced the relatively loose standards of *Borak* with a four-factor test for determining whether an implied private right of action exists.[9] Using this test, the Court determined that 18 U.S.C. § 610 (1970 & Supp. III), a criminal statute (later repealed) that prohibited corporations from making contributions to presidential campaigns, does not provide an implied private right of action for stockholders to sue corporate directors who violate the statute. 422 U.S. at 68-70. The Court described its test as follows:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted"--that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative

> intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. at 78 (emphasis in original) (citations omitted). Explaining the second prong of this test, the Court said that when federal law grants certain rights to a class of people (and thereby satisfies the first prong), "it is not necessary to show an intention to *create* a private cause of action, although an explicit purpose to *deny* such cause of action would be controlling." *Id.* at 82 (emphasis in original). Thus, the test articulated in *Cort* allowed courts to recognize an implied private right of action even in the absence of any affirmative congressional intent to create this remedy.

C. Post-*Cort* Developments

Although *Cort* has never been formally overruled, subsequent decisions have altered it virtually beyond recognition.[10] In *Cannon v. University of Chicago*, 441 U.S. 677, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979), the Court framed the implied private right of action question as one of "statutory construction" in which the Court's task is to determine whether "Congress intended to make a remedy available." 441 U.S. at 688. The *Cannon* Court nonetheless relied on the four *Cort* factors because they were "indicative of such intent."[11] *Id.* Thus, Congress's intent to create a private right of

action--virtually ignored in *Borak* and described in *Cort v. Ash* merely as one of four factors--emerged as the primary factor in *Cannon*. The Court in *Touche Ross & Co. v. Redington*, 442 U.S. 560, 99 S. Ct. 2479, 61 L. Ed. 2d 82 (1979), established that congressional intent is the *exclusive* factor, declaring that the task of courts is "limited *solely* to whether Congress intended to create the private right of action," 442 U.S. at 568 (emphasis added), and instructing that courts should use the *Cort* factors only to the extent that they help to determine legislative intent, *id.* at 575-76. *See also Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 15-16, 100 S. Ct. 242, 62 L. Ed. 2d 146 (1979) ("what must ultimately be determined is whether Congress intended to create the private remedy asserted, as our recent decisions have made clear."). Although the Supreme Court continued to recite the *Cort* factors in later implied private right of action opinions, its attempts to discern legislative intent went well beyond these factors. As the Court's opinion in *Thompson v. Thompson*, 484 U.S. 174, 108 S. Ct. 513, 98 L. Ed. 2d 512 (1988), observed, the Court has used "other tools of statutory construction" in addition to the *Cort* factors as "guides to discerning" Congress's intent. 484 U.S. at 179.

D. *Alexander v. Sandoval*

The Supreme Court's decision in *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001), strongly suggests that the Court has abandoned the *Cort v. Ash* test.[12] In *Sandoval*, the Court held that Title VI of the Civil Rights Act does not provide an implied private right of action to enforce disparate-

> impact regulations promulgated under § 602 of the Act (42 U.S.C. § 2000d-1 (2000)).[13] Although the *Sandoval* Court did not expressly reject the *Cort v. Ash* factors, it did not use them at all to guide its inquiry.[14] Instead, the Court set out the following test for discerning whether an implied private right of action exists:
>
> Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. . . . The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. . . . Statutory intent on this latter point is determinative. . . . Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.

532 U.S. at 286-87 (citations omitted). The Court concluded that the "text and structure" of § 602 did not show that Congress intended to create a personal right,[15] in light of the absence of "rights-creating language" that focuses on the protected individuals. 532 U.S. at 288-89. Next, the Court concluded that nothing in the text of § 602 demonstrated that Congress intended to create a private remedy and that the statute's provision of a remedial scheme suggests that Congress "intended to preclude" any other remedy. *Id.* at 290-91. The Court rejected the Government's argument that Congress had "ratified" an implied private right of action under § 602 by failing to address this issue when it amended Title VI.[16] Having applied what the Court called its "standard test for discerning

private causes of action" and having found no congressional intent to create a personal right or private remedy in the statute's text or structure, the Court ended its inquiry. *Id.* at 293.

E. The State of the Law Today

After *Sandoval*, the relevant inquiry for determining whether a private right of action exists appears to have two steps: (1) Did Congress intend to create a personal right?; and (2) Did Congress intend to create a private remedy? Only if the answer to both of these questions is "yes" may a court hold that an implied private right of action exists under a federal statute. *See, e.g., Three Rivers Ctr. v. Hous. Auth. of the City of Pittsburgh*, 382 F.3d 412, 421 (3d Cir. 2004) ("Put succinctly, for an implied right of action to exist, a statute must manifest Congress's intent to create (1) a personal right, and (2) a private remedy" (citing *Sandoval*, 532 U.S. at 286)). Even when we invoked the *Cort* test in *American Trucking v. Delaware Toll Bridge Commission*, 458 F.3d 291 (3d Cir. 2006), our analysis paralleled the *Sandoval* test. Focusing only on the first two "critical" *Cort* factors, 458 F.3d at 297, the *American Trucking* opinion treated the first *Cort* factor as an inquiry into legislative intent to create a personal right, 458 F.3d at 297, and the second *Cort* factor as an inquiry into legislative intent to create a private remedy, 458 F.3d at 303.[17]

III.

Applying the *Sandoval* test to § 3009, we conclude that this statute provides no implied private right of action.

A. Did Congress Intend to Provide a Personal Right in § 3009?

To determine whether a personal right existed under § 602 of Title VI, the *Sandoval* Court began by reviewing the "text and structure" of the statute to determine whether the statute contained "rights-creating" language that focuses on the "individual protected" rather than "the person regulated." 532 U.S. at 288-89.[18] Accordingly, we examine the text and structure of § 3009 to see if rights-creating language exists. The only part of the statute that explicitly establishes a "right" is § 3009(b):

> Any merchandise mailed in violation of subsection (a) of this section, or within the exceptions contained therein, may be treated as a gift by the recipient, *who shall have the right to retain, use, discard, or dispose of it in any manner he sees fit without any obligation whatsoever* to the sender.

39 U.S.C. § 3009(b) (emphasis added). With an explicit reference to a right and a focus on the individual protected, this language suffices to demonstrate Congress's intent to create a personal right for recipients to treat unsolicited merchandise as a gift. Indeed, Rodale concedes that § 3009(b)'s language is "rights-creating." (*See* Appellee's Br. at 30.)

"Rights-creating" language is not as obviously present in other sections of the statute. Section 3009(b) requires that mailers of unsolicited merchandise attach a "clear and conspicuous statement" informing the recipient of his or her right to treat the merchandise as a gift.

Section 3009(c) forbids mailers of unsolicited merchandise from sending a recipient a bill or any dunning communications. These provisions do not necessarily create "personal rights" for recipients to receive clear and conspicuous statements and to be free from bills and dunning communications. Congress worded them as prohibitions on the person regulated rather than entitlements for the person protected.[19] The provisions' failure to identify "rights" (to receive notices and not to receive bills) contrasts with the explicit identification of a "right" to keep the merchandise as a gift.[20] Even assuming *arguendo* that Congress intended these provisions to create personal rights, the distinction is largely academic because we can find no legislative intent to create a private remedy, for the reasons discussed below.

B. Did Congress Intend to Provide a Private Remedy for Violations of § 3009?

In the generation since the Supreme Court declared that legislative intent to create an implied private right of action is the sole touchstone of our inquiry, the Court has not provided a test for discerning this intent. Most of its decisions have relied on whatever indicators of legislative intent appear to be useful in the context of a given statute. The Court frequently has examined factors related to the text and structure of the statute in question, including the existence of a comprehensive remedial scheme in the statute[21] and the explicit creation of a private right of action elsewhere in the same statute.[22] The Court has also relied upon various aspects of the statute's legislative history,[23] the "customary legal incidents" that follow directly from a statutory provision,[24] Congress's explicit creation of

private rights of action in similar statutes enacted at roughly the same time,[25] and an assortment of other factors.[26] To provide some boundaries to our inquiry into congressional intent, we will confine ourselves to those purported signals of legislative intent that the parties have raised and that are consistent with current doctrine.

1. Text and Structure of § 3009

The express language of § 3009 provides only for Federal Trade Commission ("FTC") enforcement. By declaring the shipment of unsolicited merchandise and the resulting bills to be a violation of 15 U.S.C. § 45(a)(1) (and therefore unlawful), § 3009(a) authorizes the FTC to use any of the Federal Trade Commission Act's ("FTC Act") applicable enforcement mechanisms in response to this behavior. [27] The FTC Act allows the FTC to obtain a variety of remedies[28] for violations of § 45(a)(1), including injunctions[29] and civil penalties.[30] The rest of § 3009 builds on § 3009(a) by explaining what rights a recipient possesses when confronted with an unlawful merchandise shipment and by imposing additional duties on shippers of merchandise who have either chosen to disregard § 3009(a) or are subject to one of its exceptions.

The reference to FTC enforcement combined with the absence of other enforcement provisions creates a presumption that FTC enforcement of the statute is exclusive. As the *Sandoval* Court held, "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." 532 U.S. at 290. Wisniewski correctly points out that "private rights of action have been implied from

statutes that provide for agency enforcement" (Appellant's Br. at 23), but this does not change the fact that agency enforcement creates a strong presumption against implied private rights of action that must be overcome.[31]

Wisniewski's strongest argument for overcoming the presumption of exclusive FTC enforcement is based on an analogy between § 3009 and § 215 of the Investment Advisers Act ("IAA"), the statutory provision under which the Supreme Court recognized an implied private right of action in *TAMA*. (*See* Appellant's Br. at 16.) Section 215 provides that every contract whose formation or performance would violate the IAA "shall be void . . . as regards the rights of any person" who violated the statute or knew of the facts underlying its violation. 444 U.S. at 16-17 (quoting 54 Stat. 856, as set forth in 15 U.S.C. § 80b-15).[32] The Court concluded that the statutory text showed congressional intent to create a private remedy, stating:

> By declaring certain contracts void, § 215 by its terms necessarily contemplates that the issue of voidness under its criteria may be litigated somewhere. At the very least Congress must have assumed that § 215 could be raised defensively in private litigation to preclude the enforcement of an investment advisers contract. But the legal consequences of voidness are typically not so limited. A person with the power to void a contract ordinarily may resort to a court to have the contract rescinded and to obtain restitution of consideration paid. . . . For these reasons we conclude that when Congress declared in § 215 that certain contracts are void,

> it intended that the customary legal incidents of voidness would follow, including the availability of a suit for rescission or for an injunction against continued operation of the contract, and for restitution.

444 U.S. at 18-19 (citations omitted). The Court noted in a footnote that Congress might have intended that private litigants raise § 215 claims only in state court, but that "we decline to adopt such an anomalous construction without some indication that Congress in fact wished to remit the litigation of a federal right to the state courts." *Id.* at 19 n.8.

Sections 3009 and 215 do have some similarities. Both provisions define the rights of those affected by a violation of the statute. Section 215 establishes that the wronged party to a purported contract entered in violation of the IAA is under no obligation to perform. Section 3009 establishes that the recipient of merchandise sent in violation of the unordered merchandise statute is under no obligation to return or pay for the merchandise. The *TAMA* Court concluded that, through the statute's explicit declaration of voidness, Congress indicated its intent to allow the wronged party to bring an action under § 215 to rescind the void contract and to obtain restitution for consideration paid. Wisniewski argues that Congress likewise intended to create a private right of action under § 3009 that would allow recipients to obtain restitution for expenses incurred because of the sender's misrepresentations regarding their rights.

Although the *TAMA* analogy is apposite, it is not convincing. We believe that the statutes in question are

too different to allow an interpretation that Congress intended to create a private right of action under § 3009. We note that the private right of action allowed in *TAMA* was very limited. It allowed the wronged party to bring an action for "limited equitable relief," 444 U.S. at 22, which includes only those remedies closely associated with the contract's voidness: rescission of the contract, an injunction against the contract's enforcement, or restitution of consideration paid, 444 U.S. at 18-19. The *TAMA* Court explicitly stated that a party could not obtain "compensation for any diminution in the value of the rescinding party's investment alleged to have resulted from the adviser's action or inaction." *Id.* at 24 n.14. Also, *TAMA* makes clear that a party has no private right of action to recover amounts lost to an investment adviser who engaged in the fraudulent activities prohibited by § 206, *except* those amounts given as consideration under a void advisory contract. *Id.* at 24-25 & n.14. In other words, *TAMA* does not create a general presumption that Congress intended to create a private right of action for restitution whenever one party obtains a benefit from another by violating the latter party's statutory rights. Instead, its analysis is linked closely to the *explicit* declaration of voidness in the statute and the "customary legal incidents" that follow from such a declaration according to established contract law principles. *See id.* at 19.

In contrast, § 3009 does not explicitly declare any agreement to be void. Although it creates a right for recipients to keep unsolicited merchandise, it says nothing about the consequences if a mailer violates the statute and thereby induces a recipient to disregard this right.[33] As *Sandoval* tells us, creation of a right is

not enough to establish congressional intent to create a private right of action to vindicate that right. Wisniewski points to no "customary legal incidents" that follow from a declaration that an individual has the personal right to keep unordered merchandise as a gift. Accordingly, we conclude that the creation of a right to keep merchandise in § 3009, unlike § 215's voidness declaration, is not sufficient to demonstrate congressional intent to create a private right of action.

Rodale points out that Congress expressly provided private rights of action in two other provisions of the Postal Reorganization Act, suggesting that it knew how to create private rights of action when it wished. (Appellee's Br. at 18.) Sections 3017(e)(1) and (e)(2) provide private rights of action to enforce Sections 3001(l) and 3017(d), respectively. Wisniewski counters that Congress enacted § 3017 in 1999 and that this amendment therefore cannot shed any light on the meaning of the original act. (Appellant's Br. at 24-25.) Rodale concedes that these amendments do not necessarily prove Congress's lack of intent to provide a private right of action under § 3009, but claims that they "buttress" the case already made that no such intent exists. (Appellee's Br. at 20.) We need not decide whether to place any weight on these amendments, because they certainly cannot help Wisniewski, and other arguments independently support Rodale's case against an implied private right of action.

In short, the text and structure of § 3009 strongly suggest that Congress did not intend to supplement FTC enforcement with a parallel system of private litigation but "absentmindedly forgot to mention an intended private action." *See TAMA*, 444 U.S. at 20

(quoting *Cannon*, 441 U.S. at 742 (Powell, J., dissenting)).[34]

2. Legislative History [35]

Both parties concede that the congressional record is "silent" with regard to the existence of a private right of action in § 3009. (*See* Appellant's Br. at 26-27; Appellee's Br. at 17.) In *Touche Ross*, the Court noted that the legislative history of § 17(a) of the Securities Exchange Act was silent and observed that "implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." 442 U.S. at 571. But this silence does not "automatically undermine" Wisniewski's claim that an implied private right of action exists, since Congress might express its intent "in the language or structure of the statute, or in the circumstances of its enactment." *See TAMA*, 444 U.S. at 18. As we have already explained, however, the language and structure of the statute provide no support for a private right of action, and Wisniewski has not pointed to anything in the circumstances of the statute's enactment or any other factors that express the requisite intent.

3. *Kipperman v. Academy Life Insurance Co.*

In their briefs, the parties debate the meaning and relevance of *Kipperman v. Academy Life Ins. Co.*, 554 F.2d 377 (9th Cir. 1977), the only federal appellate opinion that has addressed whether an implied private right of action exists under § 3009. In *Kipperman*, the Ninth Circuit applied the *Cort* test to § 3009 and concluded that the statute provides an implied private right of action for declaratory and restitutionary relief.

See 554 F.2d at 380.[36] *Kipperman* is not persuasive authority for us because its analysis is inconsistent with the Supreme Court's subsequent decisions in *Cannon*, *Touche Ross*, and *TAMA*, which restructured the implied private right of action test to focus solely on legislative intent. The *Kipperman* opinion appears to weigh the four *Cort* factors roughly equally, providing no evidence that the court recognizes legislative intent as the sole determinative factor. *See* 554 F.2d at 380. Moreover, in its analysis of legislative intent, the *Kipperman* court states that "we believe Congress did not consider the question of a private right of action under section 3009," and it provides no evidence that Congress intended that the statute be enforced through a private right of action. 554 F.2d at 380. Lack of evidence of intent probably would have presented no obstacle under *Cort*, which says that congressional intent to create a private right of action is unnecessary as long as Congress conveyed no explicit intent to deny one. *See* Cort, 422 U.S. at 82. But Supreme Court cases decided since *Cort* and *Kipperman* have established that congressional intent to create a private right of action is critical, and the *Kipperman* court's failure to find such intent would dictate a different result in that case today.

IV.

In sum, we see no indication that Congress intended to create a private right of action under § 3009. Accordingly, we will affirm the judgment of the District Court.

Wisniewski v. Rodale, Inc., No. 06-1305

DISSENT BY: SLOVITER

DISSENT

SLOVITER, Circuit Judge, dissenting.

There is a Wonderland quality about the majority's enunciation of the inquiry before us: only if Congress intended to create a personal right and a private remedy, may a court hold that an implied right of action exists under a federal statute. I do not suggest that the majority misconstrues the recent Supreme Court precedent. Quite the contrary. The majority scrupulously reviews the relevant decisions in articulating its version of our task. The fact that I arrive at a different conclusion should not obscure the inescapable truth that we are both engaged in an illusory errand. The search is to determine whether Congress, the Congress that enacted the statute, also intended to create a private right of action. Do we really believe that Congress, with its legislative aides, lawyers, paralegals and assorted staff, is unable to state in simple declarative language that anyone injured by a violation of that statute may file suit in federal court? Do we really believe that it simply forgot? But whatever the reason Congress chose to remain silent, the Supreme Court set our course decades ago and we have the responsibility to follow by looking for clues that Congress intended that which it did not say.

Unlike the majority, I conclude that when Congress enacted § 3009(b) expressly creating a personal property right in recipients of unordered merchandise, it also enabled those recipients to take the action

necessary to exercise that right, or, in the parlance of the precedents, effect a remedy.

Section 3009(b) states that unordered merchandise "may be treated as a gift by the recipient, who shall have the right to retain, use, discard, or dispose of it in any manner he sees fit without any obligation whatsoever to the sender." 39 U.S.C. § 3009(b) (emphasis added). As the majority recognizes, "the 'rights-creating' language so critical to the Court's analysis" is unquestionably present here. *Alexander v. Sandoval*, 532 U.S. 275, 288, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001) (citing Cannon v. *Univ. of Chicago*, 441 U.S. 677, 690 n.13, 99 S. Ct. 1946, 60 L. Ed. 2d 560 (1979) (asserting that "the right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action")). We shift, then, to Congress' intent to create a remedy, with primary focus on the statute's text and structure.

Congress expressly defined the legal status of unordered merchandise, deeming it "a gift" to the recipient. Recognizing that the senders of unordered merchandise would likely attempt to "trick or bully" recipients into paying for that merchandise, 116 Cong. Rec. 22,314 (1970), Congress confirmed the recipient's right of possession by providing that the receipt of the merchandise was to be free of any obligation to the sender. Therefore, the functional effect of Congress' language was to vest in the recipient unencumbered title to the merchandise. See Ray Andrews Brown, The Law of Personal Property §§ 2.6, 7.12 (3d ed. 1975). The creation of this property right implies that Congress contemplated that a recipient of unordered

merchandise would be entitled to the attendant rights of ownership, including the ability to enforce his or her right to title.

The Supreme Court has upheld a limited right of action in analogous circumstances. In *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 12-13, 100 S. Ct. 242, 62 L. Ed. 2d 146 (1979), the Court considered whether a private right of action could be implied from certain provisions of the Investment Advisers Act of 1940 ("IAA"). Section 215 of the IAA provided "that contracts whose formation or performance would violate the Act 'shall be void . . . as regards the rights of' the violator and knowing successors in interest." Id. at 16-17 (quoting 15 U.S.C. § 80b-15). The Court reasoned that "[b]y declaring certain contracts void, § 215 by its terms necessarily contemplates that the issue of voidness under its criteria may be litigated somewhere." Id. at 18. The Court then reasoned that Congress must not only have assumed that beneficiaries of § 215 would be able to raise the statute "defensively in private litigation," but that Congress must also have envisioned that a beneficiary would be able to "resort to a court to have the contract rescinded and to obtain restitution of consideration paid." Id. Therefore, the Court concluded, "when Congress declared in § 215 that certain contracts are void, it intended that the customary legal incidents of voidness would follow, including the availability of a suit for rescission or for an injunction against continued operation of the contract, and for restitution." *Id.* at 19.

Just as the voidness of a contract is accompanied by "customary legal incidents," so is the passage of title resulting from delivery of the "gift" created by §

3009(b).[37] "By putting the donee in possession of the property, physical delivery usually obviates the need for the donee to seek judicial enforcement of the gift." Restatement (Third) of Property: Wills and Other Donative Transfers § 6.2 cmt. c (2003); see also *Farrington v. Tennessee*, 95 U.S. 679, 683, 24 L. Ed. 558 (1877) ("A gift consummated is as valid in law as any thing else."). Of course, judicial enforcement remains available where the recipient requires vindication of his or her right to title. Indeed, federal courts have long recognized that the possession of a gift gives rise to an enforceable right. See, e.g., *Comm'r of Internal Revenue v. Copley's Estate*, 194 F.2d 364, 369 (7th Cir. 1952) (noting that a completed gift "conferred upon the donee an enforceable right"); *First Nat'l Bank of Boston v. Comm'r of Internal Revenue*, 63 F.2d 685, 691 (1st Cir. 1933) (stating that "delivery and acceptance with intent to make a completed gift passes an enforceable title").

Thus, the language of § 3009(b) implies that beneficiaries of that statute may vindicate their right to possession in a limited cause of action for declaratory relief or, if the owner has been fraudulently induced to pay for the merchandise as is alleged here, restitution. See *Kipperman v. Acad. Life Ins. Co.*, 554 F.2d 377, 380 (9th Cir. 1977) (concluding that a private right of action under § 3009 should be limited to the extent that it does not overlap with the Federal Trade Commission's enforcement authority). Moreover, absent a contrary indication, courts should assume that this statutory right may be litigated in federal court. *TAMA*, 444 U.S. at 19 n.8.

The structure of § 3009 also supports a private right of action. Section 3009 is comprised of four subsections. Subsection (a) declares that the mailing of unordered merchandise and related communications, as defined in subsection (c), "constitutes an unfair method of competition and an unfair trade practice in violation of section 45(a)(1) of title 15 [the Federal Trade Commission Act ("FTCA")]." Subsection (b) creates the property right at issue in this litigation and requires the senders of unordered merchandise to mark all merchandise with a message notifying the recipients of that right. Subsection (c) prohibits senders of unordered merchandise to "mail to any recipient of such merchandise a bill for such merchandise or any dunning communications." Finally, subsection (d) defines "unordered merchandise." In summary, the statute defines the prohibited activities in subsections (c) and (d), declares that those activities are violative of the FTCA in subsection (a), and then provides a property right for the parties impacted by the prohibited activities in subsection (b).

Although subsection (a) implies that Congress intended the Federal Trade Commission ("FTC") to enforce those proscriptions, there is no suggestion in the statutory language that the beneficiaries of § 3009(b) must rely on that overworked agency for the vindication of their distinct property right. This analysis is congruent with the reasoning of TAMA. In that case, the Court distinguished between § 215 of the IAA, where it implied a private right of action, and § 206 of that Act, where it did not. It explained that "[u]nlike § 215, § 206 simply proscribes certain conduct, and does not in terms create or alter any civil liabilities." TAMA, 444 U.S. at 19. Of course, § 3009 does more than just

proscribe conduct undertaken by the senders of unordered merchandise; it alters the legal obligations of the relevant parties regarding the ownership of, and liability for, that merchandise.

Moreover, while 15 U.S.C. § 45(b) authorizes the FTC to enjoin parties employing unfair trade practices, that provision does not provide a method for parties harmed by such acts to obtain relief through the FTC. In fact, although the majority mentions that the FTCA provides for restitution to the victims of unfair trade practices, see 15 U.S.C. § 45(a)(4)(B), that provision was not added to the FTCA until 2006, thirty-six years after § 3009 was enacted, see Pub. L. No. 109-455, 120 Stat. 3372 (Dec. 22, 2006). Thus, a remedy of restitution, as Wisniewski seeks under the distinct property right created by § 3009(b), has not traditionally been within the scope of the FTC's enforcement power and was not within the FTC's power at the time § 3009 was enacted. Furthermore, parallel enforcement by the FTC and private parties is commonly used to reduce the burden on the FTC. See *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1174 n.5 (11th Cir. 1985) (noting the existence of private enforcement under the Fair Debt Collection Practices Act for actions that are also enforced by the FTC); *FTC v. TRW, Inc.*, 628 F.2d 207, 209 (D.C. Cir. 1980) (parallel private enforcement under the Federal Credit Reporting Act); Stephanie Kanwit, 1 Fed. Trade Comm'n § 1:7 (2007) (noting that "several statutes enforced by the [FTC], such as the Truth in Lending Act, permit private suits" and that the FTC "is increasingly encouraging private parties to supplement its limited resources and assist in policing the marketplace").

I recognize, as the majority emphasizes, that the Supreme Court has observed that the "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Sandoval*, 532 U.S. at 290. Distinguished from the proscription in § 3009(a), the property right created in § 3009(b) does not refer to the FTCA, nor did the 1970 version of the FTCA provide an enforcement mechanism for that right. Notably, the Court in TAMA implied a private right of action, albeit limited to rescission or restitution, despite the existence of a separate provision of the IAA permitting the Securities and Exchange Commission "to bring suit in a federal district court to enjoin violations of the [IAA] or the rules promulgated under it." 444 U.S. at 14. The FTC's powers were similarly limited at the time § 3009 was enacted. Therefore, Wisniewski's ability to obtain the limited remedy of restitution is a necessary corollary to the distinct right created by the statute.

It is important to focus on the remedy Wisniewski seeks. He claims that, in violation of the Act, Rodale pressured him to pay for books he contends he did not order. The express language of § 3009(c) provides that no mailer of unordered merchandise "shall mail . . . a bill for such merchandise or any dunning communication." Wisniewski's right to recover the funds exacted from him in violation of that provision would provide "specific and limited relief," 444 U.S. at 18, comparable to the suit for rescission in TAMA.

The Postal Reorganization Act of 1970 ("PRA") effected a major reorganization of the federal postal service. See Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719 (Aug. 12, 1970). Section 3009 was included as part of

the newly created Chapter 30 ("Nonmailable Matter"), positioned between the prohibition on pandering advertisements in § 3008 and the regulations governing the mailing of sexually oriented advertisements in § 3010. As none of the other provisions in this chapter of Title 39 created a property right similar to that created by § 3009, the lack of an overarching citizen suit provision is not unexpected.

Rodale argued, and the District Court found persuasive, that Congress' explicit creation of a private right of action in "another section of the Postal Reorganization Act . . . strongly suggests that its failure to create this right in § 3009 was intentional." *Wisniewski v. Rodale, Inc.*, 406 F. Supp. 2d 550, 557 (E.D. Pa. 2005) (citing 39 U.S.C. § 3017(e)(1)-(2)). However, § 3017 was not enacted along with § 3009 as part of the PRA. Rather, § 3017 was passed twenty-nine years later, as part of the Deceptive Mail Prevention and Enforcement Act, Pub. L. No. 106-168, 113 Stat. 1806, 1814 (Dec. 12, 1999). By 1999, the Supreme Court's implied private right of action jurisprudence, along with its tendency to reject implied rights of action, was well-established. The fact that Congress took care to include a private right of action in an unrelated section of Title 39 in 1999 has little bearing on Congress' silence when it enacted § 3009 in 1970.

Thus, the text and structure of § 3009 imply that Congress intended to create a private right of action to enforce the property right created in § 3009(b), while the placement of § 3009 in the statutory scheme does not undermine that conclusion. To the extent that legislative history may aid this inquiry into

Congressional intent, the parties concede that there is no evidence in that history directly supporting or opposing the existence of a private right of action. Of course, the absence of legislative history is not unexpected in this context and certainly does not defeat the inference created by the text and structure of § 3009. See *TAMA*, 444 U.S. at 18 ("[T]he legislative history of the Act is entirely silent-a state of affairs not surprising when it is remembered that the Act concededly does not explicitly provide any private remedies whatever."); *Cannon*, 441 U.S. at 694 ("[T]he legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question.").

Although the final two factors set forth in *Cort v. Ash*, 422 U.S. 66, 78, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975), whether the right of action is consistent with legislative purpose and appropriate under federal law, are neither necessary nor sufficient to infer the existence of a private right of action, they may still aid a court's analysis of whether Congress intended to create such a right. See *Thompson v. Thompson*, 484 U.S. 174, 183, 108 S. Ct. 513, 98 L. Ed. 2d 512 (1988); *Three Rivers Ctr. for Indep. Living, Inc. v. Housing Auth. of Pittsburgh*, 382 F.3d 412, 421 (3d Cir. 2004).

Therefore, to the extent that the majority's opinion may be read for the proposition that Cort has no further interpretive value following Sandoval, I disagree. In Sandoval, the Court had no occasion to consult the remaining Cort factors once it had concluded that the text and structure of the relevant regulation did not imply that Congress intended to create a private right of action. See *Sandoval*, 532 U.S.

at 288 (finding "that we can end . . . [the] search for Congress's intent with the text and structure" of the statute when those sources did not reveal any such intent). However, where the text and structure are either ambiguous or support the existence of a private right of action, as here, other methods of statutory interpretation, including the Cort factors, may continue to inform a court's analysis. See *id.* at 312 (Stevens, J., dissenting) (acknowledging that Cort lays out viable rules and strategies to aid a court's private right of action analysis). Thus, Sandoval did not create an exclusive test for analyzing the existence of an implied private right of action any more than Cannon or Thompson created a new test upon recognizing that Congressional intent is fundamental to this inquiry.[38]

As the only other court of appeals to have considered this issue found the latter two Cort factors relevant to its conclusion that § 3009 included a private right of action, I address those factors briefly. Specifically, the Court of Appeals for the Ninth Circuit found that a limited right of action for declaratory relief and restitution, and excluding the ability to seek injunctive relief, "would be entirely consistent with the purpose of the statute." *Kipperman*, 554 F.2d at 380. That court also concluded that, although "the practice with which section 3009 is concerned traditionally has been governed by state law . . . subjecting it to national law is within the power of Congress and the limited private right we recognize will further the purposes Congress sought to serve by enacting the section." Id. Therefore, the final two factors can at least be viewed as providing some support for the inference derived from the text and structure of § 3009 that Congress intended to create both a right and a remedy when it enacted the

statute.

For the foregoing reasons, I would reverse the judgment of the District Court and hold that § 3009 includes a limited implied right of action for the restitution that Wisniewski now seeks.

Footnotes

[1] Section 3009 provides:

> (a) Except for (1) free samples clearly and conspicuously marked as such, and (2) merchandise mailed by a charitable organization soliciting contributions, the mailing of unordered merchandise or of communications prohibited by subsection (c) of this section constitutes an unfair method of competition and an unfair trade practice in violation of section 45(a)(1) of title 15.
>
> (b) Any merchandise mailed in violation of subsection (a) of this section, or within the exceptions contained therein, may be treated as a gift by the recipient, who shall have the right to retain, use, discard, or dispose of it in any manner he sees fit without any obligation whatsoever to the sender. All such merchandise shall have attached to it a clear and conspicuous statement informing the recipient that he may treat the merchandise as a gift to him and has the right to retain, use, discard, or dispose of it in any manner he sees fit without any obligation whatsoever to the sender.

> (c) No mailer of any merchandise mailed in violation of subsection (a) of this section, or within the exceptions contained therein, shall mail to any recipient of such merchandise a bill for such merchandise or any dunning communications.
>
> (d) For the purposes of this section, "unordered merchandise" means merchandise mailed without the prior expressed request or consent of the recipient.

39 U.S.C. § 3009.

[2]The District Court had jurisdiction over the § 3009 claim under 28 U.S.C. § 1331. We have jurisdiction over this appeal under 28 U.S.C. §§ 1291 and 1294.

[3]Courts have used the terms "private right of action" and "private cause of action" interchangeably. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 291, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001) (using the terms interchangeably in the same paragraph); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575-76, 99 S. Ct. 2479, 61 L. Ed. 2d 82 (1979) (same). Throughout this opinion, we use the term "private right of action" except when quoting an opinion that uses "private cause of action."

[4]One commentator provides a description of a typical implied private right of action scenario:

> [T]he plaintiff institutes a civil action to prevent an injury or to recover damages, and he alleges that he is entitled to relief because of something contained in a legislative text. He says the

> defendant has acted or proposes to act in a manner contrary to the text. He relies upon the legislation even though the words of the text do not actually state that he has a right to bring an action of this kind, and here the defendant raises a defense. The defendant argues that the legislation does not support the plaintiff's claim because it does not state that the plaintiff is entitled to maintain an action upon it. The court must then decide the issue.

H. Miles Foy III, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts,* 71 CORNELL L. REV. 501, 503 (1986).

[5]For example, Title II of the Civil Rights Act of 1964 provides a private right of action with the following language:

> Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 2000a-2 of this title, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved . . . .

42 U.S.C. § 2000a-3 (2000).

[6]Justice Powell's dissent in *Cannon* rejects this contention, arguing that *Rigsby* did not establish a genuine implied private right of action. He describes it as merely "judicial reference to legislatively determined standards of care . . . to establish the existence of

negligence." *See Cannon*, 441 U.S. at 732 (Powell, J., dissenting).

[7]*See* Foy, *supra* note 4, at 524-33.

[8]*See Merrill Lynch v. Curran*, 456 U.S. 353, 376, 102 S. Ct. 1825, 72 L. Ed. 2d 182 & n.54 (1982); Foy, *supra* note 4, at 534-35.

[9]The *Cort* opinion never explicitly acknowledges that it is rejecting the *Borak* approach. In fact, it cites *Borak* several times in a manner suggesting that it is merely distinguishing the statute at issue in *Borak* from the one addressed in *Cort*. *See Cort*, 422 U.S. at 79-80 & n.11, 84, 85. Later cases recognize that *Cort* effectively overruled *Borak*. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275, 287, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001).

[10]Justice Scalia observed in a 1988 concurrence that *Cort's* analysis was "effectively overruled" by later Supreme Court opinions. *See Thompson v. Thompson*, 484 U.S. 174, 188, 108 S. Ct. 513, 98 L. Ed. 2d 512 (Scalia, J., concurring).

[11]Of the Justices involved in *Cannon*, only Justice Powell called for the outright abandonment of the *Cort* test, claiming that the test is unconstitutional because it permits judicial lawmaking in violation of the separation of powers. See *Cannon*, 441 U.S. at 742-43 (Powell, J., dissenting). Justice Powell declared that courts should refuse to recognize implied private rights of action "absent the most compelling evidence that Congress in fact intended such an action to exist," and that they should be "especially reluctant" to recognize them when the statute provides an alternative

mechanism for enforcing the rights it creates. *Id.* at 749 (Powell, J., dissenting).

[12]Commentators have noted that *Sandoval* implicitly affirms Justice Powell's dissenting view in *Cannon* that *Cort* should be discarded in favor of a pure focus on congressional intent. *See, e.g.*, Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 105 (2005) ("The *Sandoval* Court thus seems to have adopted Justice Powell's view that the multifactor *Cort* analysis 'too easily may be used to deflect inquiry away from the intent of Congress, and to permit a court instead to substitute its own views as to the desirability of private enforcement.'" (quoting *Cannon*, 441 U.S. at 740 (Powell, J., dissenting))).

[13]Section 601 of Title VI provides that no person shall be denied, on the basis of race, color, or national origin, the benefits of federally-funded programs. 42 U.S.C. § 2000d (2000). Section 602 authorizes federal agencies "to effectuate the provisions" of § 601 of Title VI through regulations. 42 U.S.C. § 2000d-1 (2000). As the *Sandoval* Court noted, § 601 prohibits only intentional discrimination, but the regulations promulgated under § 602 prohibit not only intentional discrimination but also activities that have a disparate impact on racial groups. 532 U.S. at 280-82. Because no party had challenged the agencies' authority to promulgate disparate-impact regulations, the Court assumed for the purposes of the case that the regulations were valid. *Id.* at 281-82. Also, the Court did not challenge the existence of an implied private right of action to enforce § 601 directly, which it deemed to have been ratified by Congress. *See id.* at 279-80.

[14]The *Sandoval* majority opinion cites *Cort* only to point out that *Cort* marked the demise of the *Borak* approach. *See Sandoval*, 532 U.S. at 287. The *Sandoval* dissent, however, suggests that *Cort* should remain viable. *See Sandoval*, 532 U.S. at 311 (Stevens, J., dissenting).

[15]To avoid confusion between the terms "private right" and "private right of action," we follow the approach of *Three Rivers Center v. Housing Authority of the City of Pittsburgh* by referring to substantive rights granted in statutes as "personal rights" rather than "private rights." *See* 382 F.3d 412, 419 n.9 (3d Cir. 2004). The Supreme Court has used the term "personal right" in the same manner. *See id.* (citing *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002)).

[16]Although we have acknowledged that Justice Scalia, the author of the *Sandoval* majority opinion, disapproves of the use of legislative history, *see American Trucking*, 458 F.3d at 298 n.5 (quoting *Blanchard v. Bergeron*, 489 U.S. 87, 98-99, 109 S. Ct. 939, 103 L. Ed. 2d 67 (1989) (Scalia, J., concurring)), nothing in *Sandoval* expressly condemns its use. *Sandoval* criticizes consideration of "expectations that the enacting Congress had formed in light of the contemporary legal context," 532 U.S. at 287-88 (quotation omitted), as well as "reliance on congressional inaction" to infer "congressional intent to ratify lower court decisions regarding a particular statutory provision," *id.* at 291-92, but stops short of condemning all judicial inquiry into legislative history. Although the *Sandoval* Court "find[s] that [it] can end" its inquiry into congressional intent with the text and

structure of Title VI, *id.* at 288, it does not state that the inquiry in all cases *must* end with text and structure.

[17]We observe that under circumstances different from *American Trucking*, however, reliance on *Cort* could lead to results that are inconsistent with *Sandoval*. As noted above, *Cort v. Ash* said that when a statute contains strong right-creating language, "it is not necessary to show an intention to *create* a private cause of action . . . ." 422 U.S. at 82. *American Trucking* expresses a related idea when it says "[w]here, as here, a statute is devoid of any right-creating language, there need be a more compelling indication in the legislative history before this court can recognize a right of action." 458 F.3d at 303. To the extent that one could interpret this statement to mean that demonstrating legislative intent to create a personal *right* eliminates or reduces the need to demonstrate legislative intent to create a private *remedy*, it is inconsistent with our reading of *Sandoval*.

[18]*Sandoval* appears to have left untouched the Court's jurisprudence on how to determine whether statutory language creates a personal right. *See* 532 U.S. at 288-89 (citing *California v. Sierra Club*, 451 U.S. 287, 294, 101 S. Ct. 1775, 68 L. Ed. 2d 101 (1981); *Univs. Research Assn., Inc. v. Coutu*, 450 U.S. 754, 101 S. Ct. 1451, 67 L. Ed. 2d 662 (1981); *Cannon*, 441 U.S. at 690).

[19]Even though *Sandoval* suggests that the distinction between a statute focusing on the person regulated and one focusing on the person protected is still significant, *see* 532 U.S. at 289, we would be reluctant to place dispositive weight on this factor. The apparent "focus"

of a statute might have more to do with Congress's writing style than its intent. *See* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 785 (5th ed. 2003) ("Does the appropriateness of a private right of action depend on whether a statute says 'no person shall be subjected to discrimination in a federally funded program' rather than 'no federally funded program shall discriminate'?"). In the present case, for example, § 3009(c) might have appeared to "focus" more on the individual protected if Congress had written "No recipient shall be mailed a bill for such merchandise . . . ," but the meaning would be identical. We do not consider Congress's use of the passive voice a reliable guide to its intent to create personal rights.

[20]We also note that the provisions requiring mailers to notify recipients of their rights and to refrain from billing them are ancillary to the recipients' right to keep the merchandise as a gift. These provisions ensure that recipients are aware of this right, but provide no independent benefit to a recipient who is fully aware that he or she has a right to keep the merchandise.

[21]*See, e.g., Sandoval*, 532 U.S. at 290 ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."); *Russell*, 473 U.S. at 146, 105 S. Ct. 3085, 87 L. Ed. 2d 96 ("The six carefully integrated civil enforcement provisions . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly."); *TAMA*, 444 U.S. at 19-20 ("It is an elemental canon of statutory construction that where a statute expressly provides a

particular remedy or remedies, a court must be chary of reading others into it.").

[22]*See, e.g., Coutu*, 450 U.S. at 773 (highlighting another provision of the same Act explicitly conferring a private right of action); *Touche Ross*, 442 U.S. at 571-72 (pointing out that several other provisions of the same act explicitly provide a private right of action, showing that "when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly").

[23]Among the aspects of legislative history that the Court has considered in the past are statements of intent in the congressional record associated with the original enactment, *see, e.g., Thompson*, 484 U.S. at 184-85; *National Sea Clammers*, 453 U.S. at 17-18, 101 S. Ct. 2615, 69 L. Ed. 2d 435; *Coutu*, 450 U.S. at 773-75, and statements of intent in the congressional record associated with later amendments, *see, e.g., Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 538-40, 104 S. Ct. 831, 78 L. Ed. 2d 645 (1984); *Merrill Lynch*, 456 U.S. at 383-84; *Coutu*, 450 U.S. at 778-79. In certain contexts, the Court has inferred a private right of action from Congress's enactment of a statute containing language similar to that of a statute in which courts had previously found an implied private right of action. *See, e.g., Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 176-77, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005); *Cannon*, 441 U.S. at 694-96. In the past, the Court had inferred that Congress intended to ratify a private right of action when it amended a statute while leaving unchanged a provision that federal courts had interpreted to confer a private right of action, *see, e.g., Merrill Lynch*, 456 U.S. at 381-82, but later Court

opinions have foreclosed this option, *see Sandoval*, 532 at 291-92; *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 186, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994). As the *Sandoval* opinion demonstrates, the Court is willing to dispense entirely with an inquiry into legislative history when the text and structure of the statute are clear. *See supra* note 16.

[24]*See TAMA*, 444 U.S. at 18-20 (holding that Congress intended that "customary legal incidents" of contract voidness, including a private right to sue for rescission, an injunction, or restitution, would follow from its statutory declaration that certain contracts "shall be void").

[25]*See, e.g., Cent. Bank of Denver*, 511 U.S. at 184-85 (declining to find an implied private cause of action for aiding and abetting under the Securities Exchange Act of 1934 because Congress had acted against the "backdrop" of a 1929 federal securities law and securities laws in eleven states that had provided explicitly for such a cause of action); *Northwest Airlines, Inc. v. Transport Workers Union of America*, 451 U.S. 77, 92, 101 S. Ct. 1571, 67 L. Ed. 2d 750 & n.24 (1981) (declining to find an implied private right of action for contribution under the Equal Pay Act and Title VII and noting that it was "significant" but "not dispositive" that Congress had expressly provided for a right to contribution in certain securities acts); *TAMA*, 444 U.S. at 21 (noting that Congress expressly authorized private suits for damages in other securities-related statutes enacted at around the same time as the IAA).

[26]For example, the Court has examined the extent to which state law remedies are available, *see Daily Income Fund*, 464 U.S. at 542 (noting that the subject matter of the proposed private cause of action is "generally governed" by state law), and even the provision's location in the United States Code, *see Thompson*, 484 U.S. at 183 (stating that the placement of the provision as an addendum to the full faith and credit statute is "strong proof" that Congress did not intend to create a private right of action).

[27]We see no merit in Wisniewski's argument that "[n]owhere does the statute specifically refer to *enforcement* by the FTC . . . ." (Appellant's Br. at 23 (emphasis in original)). For all practical purposes, the reference to "section 45(a)(1)" is a reference to FTC enforcement.

[28]One of the remedies in the current FTC Act is restitution. *See* 15 U.S.C.A. § 45(a)(4)(B) (West 2007) ("All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims."). Congress added this remedy to the FTC Act in 2006, however, so it was not part of the FTC's arsenal at the time § 3009 was enacted. *See* Pub. L. No. 109-455, 120 Stat. 3372 (Dec. 22, 2006).

[29]*See* 15 U.S.C. § 45(a)(2) (2000) ("The Commission is hereby empowered and directed to prevent persons, partnerships, and corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.").

30*See* 15 U.S.C. § 45(m)(1)(A) (2000) ("The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this chapter respecting unfair or deceptive acts or practices . . . with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule.").

[31]Since the demise of *Borak*, the Supreme Court has generally been unwilling to find implied private rights of action in statutes that expressly provide for agency or other enforcement. The Court has made exceptions for certain securities and anti-discrimination statutes, but it has done so primarily because of longstanding precedent interpreting the same or similar language to create a private right of action. *See Jackson*, 544 U.S. at 176 (private retaliation actions under Title IX); *Huddleston*, 459 U.S. at 380-81, 103 S. Ct. 683, 74 L. Ed. 2d 548 (private actions based on registration statement fraud under Section 10(b) of Securities Exchange Act); *Merrill Lynch*, 456 U.S. at 378-82 (private actions under Commodities Exchange Act); *Cannon*, 441 U.S. at 694-98 (private actions under Title IX); *Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 92 S. Ct. 165, 30 L. Ed. 2d 128 (1971) (approving with virtually no analysis a private right of action under Section 10(b)). Moreover, the Court has taken a stricter approach in recent years to both securities and anti-discrimination statutes despite longstanding interpretations. *See Sandoval*, 532 U.S. at 293 (finding no private action under § 602 of Title VI); *Cent. Bank of Denver*, 511 U.S. at 183-88 (finding no private right of action for aiding and abetting under Section 10(b)).

[32]Section 215 declares the contract to be "void," a term typically used in contract law to describe contracts that create no enforceable rights or obligations for either party. *See* RESTATEMENT (SECOND) OF CONTRACTS § 7, cmt. a. Under § 215, the contract is only void "as regards the rights" of a wrongdoer, which suggests that the contract is merely "voidable" at the innocent party's option. In another case, the Supreme Court concluded that "void," as used in § 29(b) of the Securities Exchange Act, really meant "voidable," and noted that § 215 of the IAA is a parallel provision. *See Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 387, 90 S. Ct. 616, 24 L. Ed. 2d 593 (1970).

[33]At most, Wisniewski could contend that his payment to Rodale for the unordered merchandise created a faux-contractual relationship between the two parties, with Rodale's shipment of merchandise as the "offer" and Wisniewski's payment as the "acceptance." Under this reasoning, if Rodale obtained Wisniewski's acceptance in a manner that violated the statute (e.g., by failing to inform him of his rights), then the acceptance would be invalid and the contract voidable. Thus, the declaration that Wisniewski has a right to keep the merchandise would be equivalent to a declaration that any contract that disregarded this right shall be void, which under *TAMA* would entitle Wisniewski to the "customary legal incidents" of a void contract (including restitution). This line of reasoning is too speculative to be convincing, however. It requires us to make an assumption not present in *TAMA*: that statutory recognition of a right automatically carries with it the power to void any purported contracts that arise when a wrongdoer ignores this right. Given the absence of any direct or indirect reference in § 3009 to

any contract, we are not willing to make such an assumption.

[34]Our holding will not necessarily deprive individuals of a remedy in the event that they are unable to attract the interest of FTC enforcers. Individuals who pay for unordered merchandise, either out of ignorance of their right or fear of a negative credit rating, might have recourse to state courts. A footnote in *TAMA* says that it would be "anomalous" to assume that Congress intended "to remit the litigation of a federal right to the state courts." 444 U.S. at 19 n.8. In the present case, however, Congress has authorized litigation by the FTC in federal court. State court may remain a fallback option for individuals who believe that the FTC has not been vigorous enough in enforcing their rights.

[35]Regarding the extent to which legislative history is relevant at all in implied private right of action inquiries, see *supra* note 16.

[36]The Ninth Circuit did not extend this implied private right of action to injunctive relief because it feared that injunctions would interfere with FTC enforcement of § 3009. *See* 554 F.2d at 380. The court ultimately dismissed the restitution claim on the ground that insurance policies are not "merchandise" within the meaning of § 3009. *See* id. at 380-81.

[37]The majority's attempt to analogize to TAMA by applying a contract analysis to § 3009 fails because § 3009 does not create a contract right, but a property right. Therefore, § 3009 must be analyzed with an eye towards the "customary legal incidents" associated with the property right created thereby.

[38]A cursory review of federal case law reveals that only one other federal court has viewed the Court's decision as creating a distinct " Sandoval test." That court, however, concluded that Sandoval created a four-step test considerably different from the two-step test discussed in the majority's opinion. See *Ruta v. Delta Airlines, Inc.*, 322 F. Supp. 2d 391, 402 (S.D.N.Y. 2004).

CIVIL ACTION NO. 03-742

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

DAVID WISNIEWSKI,
Plaintiff

v.

RODALE, Inc.,
Defendant

December 20, 2005, Decided

December 20, 2005, Filed; December 20, 2005, Entered

COUNSEL: MICHAEL KARNUTH, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, Plaintiff, Pro se.

For DAVID WISNIEWSKI, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, Plaintiff: DANIEL B. ALLANOFF, MEREDITH COHEN GREENFOGEL & SKIRNICK, P.C., PHILADELPHIA, PA.

For RODALE, INC., Defendant: ERROL C. DEANS, JR., GROSS MCGINLEY LABARRE & EATON LLP, ALLENTOWN, PA. GREGORY A. CLARICK, MANATT PHELPS & PHILLIPS LLP, NEW YORK, NY. PAUL A. MCGINLEY, SUSAN ELLIS WILD, GROSS, MCGINLEY, LABARRE & EATON, LLP, ALLENTOWN, PA.

OPINION

Diamond, J.

MEMORANDUM

Plaintiff and class representative David Wisniewski alleges that magazine and book publisher Rodale, Inc. violated a federal statute and various state laws when it enrolled him and others in its annual book program. Rodale has moved for summary judgment, arguing, in part, that the federal statute provides no private right of action. I agree and dismiss Wisniewski's federal claim. I also dismiss Wisniewski's state law claims for want of jurisdiction.

BACKGROUND AND PROCEDURAL HISTORY

Then-Plaintiff Michael Karnuth began this litigation on February 25, 2003, alleging that simply because he was a subscriber to Rodale's "Men's Health" magazine, Defendant sent him books he had never ordered -- Sex, a Man's Guide (in 2000), Report 2001: A Man's Guide to Women (in 2001), and Report 2002: A Man's Guide to Women (in 2002) -- and then demanded payment. (Compl. at ¶¶ 1, 12-17). Karnuth charged that Rodale had violated the Postal Reorganization Act, Pennsylvania's Unsolicited Merchandise Act, Pennsylvania's Unfair Trade Practices and Consumer Protection Law, and unnamed provisions from other states. *See* 39 U.S.C. § 3009 (2004), 73 Pa. Cons. Stat. §§ 2001, 201-02 et seq. This Court had jurisdiction to hear Plaintiff's § 3009 claim pursuant to 28 U.S.C. § 1331 and the state law claims pursuant to 28 U.S.C. § 1367.

Rodale moved to dismiss the Pennsylvania state law claims only; the Honorable Franklin Van Antwerpen denied the Motion. See Order of May 16, 2003, at n.1 (Doc. No. 9) (Van Antwerpen, J.).

Karnuth next moved to certify his Complaint as a class action on behalf of "all persons who, without prior consent, received books and other products from Defendant and an invoice for payment for such books and products," as well as a subclass of "all members of the class who paid, in part or whole, the invoices for such books and products for personal, family, or household purposes." (*Id.* at ¶ 15). Although Karnuth initially alleged that he had not solicited any of the Rodale publications, discovery revealed that this was false: he had ordered and paid for at least one of the books. Judge Van Antwerpen observed that if Karnuth had indeed ordered the Rodale books, "then his claims will be quite distinct than other members of the proposed class, assuming he has any claims at all." *See Karnuth v. Rodale, Inc.*, 2003 U.S. Dist. LEXIS 12095, *10 (E.D. Pa. July 2, 2003). Accordingly, Judge Van Antwerpen denied class certification without prejudice. *See id.* at *8-*10.

The case was reassigned to me on July 16, 2004. Karnuth then filed an Amended Complaint and renewed his Motion for Class Certification. The Amended Complaint included allegations that differed materially from those in Karnuth's Original Complaint. Karnuth now alleged that in September 2000, he completed and returned to Rodale a "One Shot Order Card," allowing him to preview Sex, A Man's Guide and enrolling him in Karnuth's annual book preview program. (Amended Compl. at ¶¶ 7-8). If Karnuth did

not return the book (at Rodale's expense) within twenty-one days, he would be required to pay for it. Karnuth alleged that he kept Sex: A Man's Guide and sent a $ 39.65 check to Rodale in full payment. Karnuth also alleged that as part of its preview program, Rodale sent him two additional books: Report 2001: A Man's Guide to Women (in 2001) and Report 2002: A Man's Guide to Women (in 2002).

Karnuth's new allegations directly contradicted his earlier allegation that "at no time either before or after Defendant sent Plaintiff and the class the 2001 and 2002 unsolicited books did Plaintiff request or consent to the mailing or sending to him of the subject books." (Compl. at ¶ 24). In light of that contradiction, I reasoned that, as Judge Van Antwerpen anticipated, Karnuth had unique credibility problems that would prevent him from adequately protecting the interests of the class. *See Karnuth v. Rodale, Inc.*, 2005 U.S. Dist. LEXIS 5241, * 8 (E.D. Pa. Mar. 30, 2005). I therefore denied the Class Certification Motion without prejudice and allowed Plaintiff's counsel to substitute a new class representative. *Id.*; cf. N.T. Mar. 7, 2005 at 45:22-25 (Plaintiff's counsel stating that he could easily find another class representative).

On April 13, 2005, Plaintiff's counsel filed a notice substituting David Wisniewski as the new putative class representative. Wisniewski acknowledged that he, too, had returned the "One Shot Order Card" and had thus received Sex: A Man's Guide. Wisniewski further alleged that he did not understand that by returning the card, he enrolled in Rodale's annual book preview program. Thus, he alleged that he did not order the books Rodale subsequently sent him -- the same Report

2001 and Report 2002 volumes received by Karnuth. He nonetheless paid for them to preserve his credit rating. (Notice of Substitution at ¶¶ 2, 4-5); (Amended Notice of Substitution at ¶¶ 4-7). Like Karnuth, Wisniewski sought to represent "all persons who are or have been enrolled in Rodale's Annual Programs and received books from Rodale and invoices for payment of such books, within six years preceding the filing of Plaintiff's Class Action Complaint." (Amended Compl. at ¶ 36). In addition, he sought to certify a subclass of "all members of the class who paid, in part or whole, the invoices for such books for personal, family or household purposes." *Id.*

At the class certification stage, it was apparent that Plaintiff's theories of liability were problematic. *See Karnuth v. Rodale*, 2005 U.S. Dist. LEXIS 14426, at *9-*10 (E.D. Pa. July 18, 2005). For instance, Wisniewski admitted in his deposition that he had read very little of the information Rodale sent to him. Naturally, Rodale questioned how Wisniewski could credibly allege that the "One Shot Order Card" misled him if he had not read it. (N.T. of Oct. 24, 2005, at 14:6-14, 24:13-25:23). Wisniewski responded that whether or not he read the card was immaterial. In his view, the Federal Trade Commission's Prenotification Negative Option Rule sets forth an objective disclosure standard -- enforceable through 39 U.S.C. § 3009 -- that Rodale's Order Card did not meet. *Id.* at 16:2-19:25; see 16 C.F.R. § 425.1.

As I noted in my previous opinion, I could find no authority linking the FTC Rule and the Postal Reorganization Act. *See Karnuth*, 2005 U.S. Dist. LEXIS 14426, at *9. As I also noted, however, I could

not then consider this or any other contention that went to the merits of Wisniewski's Amended Complaint. *See* Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 166-67 (3d Cir. 2001) (court may not consider merits when deciding class certification under Rule 23). Accordingly, I granted Wisniewski's Motion for Class Certification on his federal claim. *Karnuth*, 2005 U.S. Dist. LEXIS 14426, at *15. Because Plaintiff had failed to analyze the distinctions among the various unnamed state statutes, I denied certification on his state claims.

The parties agree that my ruling on this Motion for Summary Judgment will bind only the named parties. Accordingly, they have not notified potential class members of the Motion. (N.T. of Oct. 24, 2005, at 22:24-23:18). My ruling on this Motion thus has no preclusive effect on other class members; rather, it can serve only as precedent. Cf. Fed. R. Civ. Proc. 23(c)(1)(B) ("For any class certified under Rule 23(b)(3), the court must direct to class members the best notice practicable under the circumstances . . . .").

STANDARD OF REVIEW

Upon motion of any party, I may grant summary judgment "if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party must initially show the absence of any genuine issues of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). In its review of the record, "the court must give the nonmoving party the benefit of all reasonable inferences." *See Sempier v. Johnson & Higgins*, 45 F.3d

724, 727 (3d Cir. 1995), cert. denied, 515 U.S. 1159, 132 L. Ed. 2d 854, 115 S. Ct. 2611 (1995). An issue is material only if it could affect the result of the suit under governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). If, after viewing all reasonable inferences in favor of the non-moving party, the court determines that there is no genuine issue of material fact, summary judgment is appropriate. *See Celotex*, 477 U.S. at 322; *Wisniewski v. Johns-Manville Corp.*, 812 F.2d 81, 83 (3d Cir. 1987). The court's function is not to weigh the evidence and determine the facts, but rather to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249.

DISCUSSION

I. The Law of the Case Does Not Bar this Decision

As a threshold matter, Plaintiff argues that the law of the case doctrine compels me to conclude that § 3009 provides a private right of action. See Pl. Mem. in Opp. to Rodale's Mot. for Summ. J. at 2-3. I do not agree.

Rodale initially moved to dismiss Plaintiff's claim under Pennsylvania's Unsolicited Merchandise Act, contending that the UMA does not provide a private right of action. In denying Rodale's Motion, Judge Van Antwerpen cited *Kipperman v. Academy Life Ins. Co.*, in which the Ninth Circuit had found a private right of action under the "analogous federal statute . . . 39 U.S.C. § 3009." Order of May 16, 2003, at n.1 (Doc. No. 9) (Van Antwerpen, J.) (citing 554 F.2d 377, 380 (9th Cir. 1977)). Plaintiff argues that in thus holding that Pa.'s UMA provides a private right of action, Judge

Van Antwerpen necessarily also held that "there is a private right of action under [§] 3009 . . . ." Pl. Mem. in Opp. to Rodale's Mot. for Summ. J. at 3. To state Plaintiff's contention is to refute it.

The Supreme Court has held that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 75 L. Ed. 2d 318 (1983). "Courts apply the law of the case doctrine when their prior decisions in an ongoing case either expressly resolved an issue or necessarily resolved it by implication." *UA Theatre Circuit, Inc. v. Twp. of Warrington, PA*, 316 F.3d 392, 397-98 (3d Cir. 2003) (quoting *Aramony v. United Way of Am.*, 254 F.3d 403, 410 (2d Cir. 2001)). I do not believe the doctrine applies here.

Rodale did not ask Judge Van Antwerpen to determine whether § 3009 included a private right of action; it moved to dismiss Plaintiff's state law claims only. See Answer to Count 1 (Doc. No. 3); Mot. to Dismiss Counts II and III (Doc. No. 4). Thus, Judge Van Antwerpen never "explicitly resolved" the issue. Rather, he explicitly applied Pennsylvania state law in analyzing whether a private right of action exists under the Pennsylvania Unsolicited Merchandise Act, and offered Kipperman as advisory authority. See Order of May 16, 2003, at n.1 (Doc. 9) (Van Antwerpen, J.) (analyzing whether a private right of action exists under the three factors discussed in *Estate of Witthoeft v. Kiskaddon*, 557 Pa. 340, 733 A.2d 623, 626 (Pa. 1999).

Nor does Judge Van Antwerpen's ruling that the UMA provides a private right of action necessarily imply the

existence of a right of action under § 3009. The language and structure of the UMA and § 3009 differ significantly. The UMA is silent with respect to its enforcement mechanism; § 3009 expressly provides for enforcement by the FTC. Compare 39 U.S.C. § 3009 with 73 Pa. Cons. Stat. § 2001. A different section of the Postal Reorganization Act provides for private enforcement; the UMA has no such similar provision. See 39 U.S.C. § 3017; 73 Pa. Cons. Stat. § 2001. In these circumstances, Judge Van Antwerpen's analysis of the UMA *necessarily* had nothing to do with § 3009. Finally, as the Third Circuit has held, the law of the case doctrine "does not restrict a court's power but rather governs its exercise of discretion." *In re City of Philadelphia Litig.*, 158 F.3d 711, 718 (3d Cir. 1998). The circumstances presented here strongly militate against applying the doctrine. Accordingly, I will proceed to a discussion of the merits of Rodale's contentions.

II. Section 3009 Does Not Provide for a Private Right of Action

Rodale contends that because only the FTC may bring an action under § 3009, Wisniewski may not seek to enforce the statute here. If Rodale is correct, then Plaintiff is without any remaining federal cause of action.

Congress must create a private right of action, either expressly or by implication. *See Alexander v. Sandoval*, 532 U.S. 275, 286, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001). Plaintiff has not shown that Congress did either with respect to § 3009.

First, as Plaintiff acknowledges, the statute's actual text does not expressly create a private right of action:

> (a) Except for (1) free samples clearly and conspicuously marked as such, and (2) merchandise mailed by a charitable organization soliciting contributions, the mailing of unordered merchandise or of communications prohibited by subsection (c) of this section constitutes an unfair method of competition and an unfair trade practice in violation of section 45(a)(1) of Title 15.
>
> (b) Any merchandise mailed in violation of subsection (a) of this section, or within the exceptions contained therein, may be treated as a gift by the recipient, who shall have the right to retain, use, discard, or dispose of it in any manner he sees fit without any obligation whatsoever to the sender. All such merchandise shall have attached to it a clear and conspicuous statement informing the recipient that he may treat the merchandise as a gift to him and has the right to retain, use, discard, or dispose of it in any manner he sees fit without any obligation whatsoever to the sender.

39 U.S.C. § 3009; see Pl. Mem. in Opp. to Rodale's Mot. for Summ. J at 6. Rather, Plaintiff strenuously contends that this statutory language creates an implied private right of action. *See id.* at 3-9; *Three Rivers Ctr. for Indep. Living, Inc. v. Housing Auth. of Pittsburgh*, 382 F.3d 412, 419 (3d Cir. 2004). I disagree.

The Supreme Court has created a four-factor test to

determine "whether a private remedy is implicit in a statute not expressly providing one":

> First, is the plaintiff "one of the class for whose *especial* benefit the statute was enacted," -- that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? [Fourth,] is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort v. Ash, 422 U.S. 66, 78, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975) (citations omitted). The Court subsequently has held that "the burden is on [the proponent of a private right of action] to demonstrate that Congress intended to make a private remedy." *Suter v. Artist M.*, 503 U.S. 347, 363-64, 112 S. Ct. 1360, 118 L. Ed. 2d 1 (1992). The Court has underscored that merely citing to the so-called "rights-creating" language of a statute does not meet this burden. *See Gonzaga University v. Doe*, 536 U.S. 273, 284, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002) ("Even where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent 'to create not just a private *right* but also a private *remedy*.'"); cf. *Care Choices HMO v. Engstrom*, 330 F.3d 786, 789 (6th Cir. 2003) (granting of Medicare-substitute HMOs certain reimbursement rights "alone [was] not sufficient to imply a private

right of action"). As the Third Circuit has noted, "even when Congress creates rights or obligations (including personal rights), it does not necessarily follow that private parties can enforce them or obtain a direct remedy through the judicial process." *Three Rivers*, 382 F.3d at 420. For an implied right of action to exist, "the statute [must] manifest[] an intent 'to create not just a private *right* but also a private *remedy*.'" *See Gonzaga*, 536 U.S. at 284 (quoting *Sandoval*, 532 U.S. at 286).

The Supreme Court has further clarified *Cort v. Ash* by holding that "statutory intent" is "determinative," and that "without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Alexander v. Sandoval*, 532 U.S. at 286. The Third Circuit has explained that under *Sandoval*, "Congress's intent in enacting a statute is always the 'focal point' in determining whether courts should infer a private right of action." *Three Rivers*, 382 F.3d at 421. Accordingly, I need not "trudge through all four of the [Cort v. Ash] factors when the dispositive question of legislative intent has been resolved." *Neer v. Pelino*, 389 F. Supp. 2d 648, 653 (E.D. Pa. 2005) (citing *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 388, 102 S. Ct. 1825, 72 L. Ed. 2d 182 (1982)).

Plaintiff ignores this wealth of controlling authority and instead misstates the law, arguing that "the Supreme Court has held, without exception, absent a clear Congressional intent to exclude 'judicial interference' with the particular statute, that . . . language [such as that in § 3009(b)]" -- specifically, its provision allowing a consumer to "treat" unordered merchandise as a "gift" -- "creates a presumption in favor of a private right of

action to enforce that right." See Pl. Mem. in Opp. to Rodale's Mot. for Summ. J. at 5-6; see also N.T. of Oct. 24, 2005, at 13:8-20 (Plaintiff's counsel asserting that "the only way you can show that it's not to be enforced . . . is if . . . you find specific concrete evidence that Congress didn't intend there to be a remedy . . . ."). As I have already discussed, the law provides exactly the opposite.

Plaintiff also offers two pre-*Sandoval* cases, *Kipperman v. Academy Life Ins. Co.* and *Crosley v. Lens Express, Inc.*, in which courts applied the *Cort v. Ash* factors and found a private right of action under § 3009. *See Kipperman*, 554 F.2d 377; *Crosley*, No. SA00CA385EP, 2001 U.S. Dist. LEXIS 25222, at *2-*4 (W.D. Tex. Feb. 12, 2001). Plaintiff's selection of these decisions underscores the merit of Rodale's contentions.

I note first that these decisions are not controlling. *See, e.g., Keefe v. Prudential Prop. & Cas. Ins. Co.*, 203 F.3d 218, 226 (3d Cir. 2000) ("The authority from other jurisdictions provides some helpful guidelines, but has no great persuasive effect . . . ."). Moreover, as the Sandoval Court "abandoned" the earlier practice of finding private rights of action to "make effective [statutory] purpose, " these pre-Sandoval cases are unpersuasive. *See Sandoval*, 532 U.S. at 287 (calling this practice part of an "*ancien regime.*"); *see also Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 67 n. 3, 122 S. Ct. 515, 151 L. Ed. 2d 456 (2001) (noting that the Supreme Court has, in recent years, unambiguously "retreated from [its] previous willingness to imply a cause of action where Congress has not provided one"). Indeed, *Crosley* has been rejected explicitly in the only post-Sandoval decision to discuss whether § 3009

implies a private right of action. *Randolph*, 2002 U.S. Dist. LEXIS 26289, at *6-*7. As for Kipperman, the Ninth Circuit there acknowledged that it was creating a private remedy in the *absence* of Congressional intent. *Kipperman*, 554 F.2d at 380. Although such a decision arguably was appropriate in 1977, it is clearly not appropriate today.

Applying *Sandoval* and the related authority discussed above, I conclude that § 3009 includes no implied private right of action. Section 3009(a) explicitly refers to that portion of the Federal Trade Commission Act giving enforcement authority to the FTC rather than to consumers. See 39 U.S.C. § 3009; 15 U.S.C. § 45(a)(1). Congress is presumed to know both the scope of the enforcement powers it has granted to the FTC and that no private right of action exists under the FTC Act. *Randolph v. Oxmoor House, Inc.*, No. SA01CA0699, 2002 U.S. Dist. LEXIS 26289, at *25 (W.D. Tex. Sept. 30, 2002); *see also Freedman v. Meldy's, Inc.*, 587 F. Supp. 658 (E.D. Pa. 1984) (analyzing the repeated holding that the FTC Act includes no private right of action). Moreover, Congress explicitly created a private right of action in another section of the Postal Reorganization Act. See 39 U.S.C. § 3017(e)(1)-(2). This strongly suggests that its failure to create this right in § 3009 was intentional. *See Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 20, 100 S. Ct. 242, 62 L. Ed. 2d 146 (1979) (conferred private right of action in one statutory provision but silence in another "strongly suggests" that Congress did not intend to create such a right). Finally, the legislative history is silent as to whether Congress intended to create a private right of action. *See Randolph*, 2002 U.S. Dist. LEXIS 26289, at *10-*11 (discussing the legislative

history of § 3009).

In these circumstances, the statute's text, structure, and legislative history compel me to conclude that Congress chose not to create a private right of action under § 3009. *See Sandoval*, 532 U.S. at 288 (noting that the inquiry into legislative intent involves looking to the text and structure of a statute); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571, 99 S. Ct. 2479, 61 L. Ed. 2d 82 (1979) ("Implying a private right of action on the basis of congressional silence is a hazardous enterprise at best."); *Gaj v. [*558] U.S. Postal Service*, 800 F.2d 64, 68-69 (3d Cir. 1986) (finding no private right of action under Postal Reorganization Act, 39 U.S.C. § 1001(b), because neither language of statute nor legislative history reflected Congressional intent to create private remedy). As the only other court to deal with this question has noted, "if a private individual wishes an injunction against an unfair trade practice as defined in section 3009, the individual must seek recourse with the FTC or pursue any other available federal or state court remedies." *Randolph*, 2002 U.S. Dist. LEXIS 26289, *25-*26 (W.D. Tex. 2002).

III. The Court Lacks Jurisdiction Over Plaintiff's State Law Claims

In every case, a federal court is required independently to examine its jurisdiction. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990) overruled on other grounds by *City of Littleton v. Z.J. Gifts* D-4, LLC, 541 U.S. 774, 124 S. Ct. 2219, 159 L. Ed. 2d 84 (2004); *see also, Allen v. Wright*, 468 U.S. 737, 750, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984). The court may thus address jurisdiction *sua*

sponte at any stage of proceedings. *See FW/PBS, Inc.*, 493 U.S. at 230; *Sun Buick v. Saab Cars U.S.A.*, 26 F.3d 1259, 1261 (3d Cir. 1994); *Eastampton Center, LLC v. Township of Eastampton*, 155 F. Supp. 2d 102, 112 (D.N.J. 2001). When determining whether to exercise pendent jurisdiction over state law claims, federal courts should consider judicial economy, convenience, fairness to litigants, and comity. *See Hudson United Bank v. Litenda Mortg. Corp.*, 142 F.3d 151, 157 (3d Cir. 1998); *Lentino v. Fringe Employee Plans, Inc.*, 611 F.2d 474, 478 (3d Cir. 1979).

Whether or not Wisniewski has even alleged a claim under state law has become a matter of some dispute. The Amended Complaint, filed when Karnuth was the named Plaintiff, purports to bring claims under Pennsylvania statutes "and similar . . . acts in other states." Yet, as I have noted, the Amended Complaint includes specific cites to Pennsylvania law only. (Compl. at PP 50-59). Wisniewski, a resident of Illinois, adopted the Amended Complaint as his own. Given Wisniewski's residence, Defendant directed its Motion to any claims alleged under Illinois law. Plaintiff has indicated, however, that he apparently will not proceed on his state law claims. (N.T. of Oct. 24, 2005, at 67:22-70:17). In any event, having dismissed Plaintiff's federal claim, I have discretion to dismiss any remaining state law claims for want of jurisdiction. 28 U.S.C. 1367(c)(3); *see also Hudson United*, 142 F.3d at 157; Fortuna's Cab Service, 269 F. Supp. 2d 562, 566 (D.N.J. 2003) (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)). As it appears Plaintiff has abandoned any remaining state law claims for the purposes of this litigation, there is no prejudice to either party if I dismiss the Amended Complaint in its

entirety. *See Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 444 (3d Cir. 1997) ("Because all federal claims were correctly dismissed and dismissal of the remaining contract claims would not be unfair to the litigants or result in waste of judicial resources" dismissal of state claims was appropriate). Accordingly, I dismiss the remainder of Plaintiff's Complaint for want of jurisdiction.

An appropriate Order follows.

PAUL S. DIAMOND, J.

ORDER

AND NOW, this 20th day of December, 2005, upon consideration of Plaintiff's Motion for Partial Summary Judgment (Doc. No. 79), Defendant's Motion for Summary Judgment (Doc. No. 80), the parties' responses, and any related submissions, it is hereby **ORDERED** as follows:

1. Plaintiff's Motion for Partial Summary Judgment is **DENIED.**

2. Defendant's Motion for Summary Judgment is **GRANTED**. Count I of Plaintiff's Complaint is hereby **DISMISSED with prejudice.**

3. Counts II and III of Plaintiff's Complaint are hereby **DISMISSED without prejudice** for want of jurisdiction. The Clerk of Court shall close this matter for statistical purposes.

BY THE COURT/PAUL S. DIAMOND, J.

Dated: 1/24/2008

No. 06-1305

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

DAVID WISNIEWSKI, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED

v.

RODALE, INC. David Wisniewski, Appellant

On Appeal from the United States District Court for the Eastern District of Pennsylvania. District Court No. 03-cv-00742. District Judge: The Honorable Paul S. Diamond.

SUR PETITION FOR REHEARING

Before: SCIRICA, Chief Judge, SLOVITOR, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN and WEIS,* Circuit Judges

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in regular active service, and no judge who concurred in the decisions having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is

DENIED.

Footnote

*The vote of the Honorable Joseph F. Weis, Jr., Senior United States Circuit Judge, is limited to panel rehearing only.

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FILED
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SUPREME COURT, U.S.

No. 07-1350

In The
Supreme Court of the United States

DAVID WISNIEWSKI, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED,

Petitioner,

v.

RODALE INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Has Petitioner presented compelling reasons for this Court to review the Third Circuit decision in *Wisniewski v. Rodale, Inc.*, 510 F.3d 294 (3d Cir. 2007), which applies this Court's governing implied private right of action jurisprudence in a manner consistent with every other court and academic commentary and which correctly concludes that 39 U.S.C. § 3009 does not provide for a private right of action?

DISCLOSURE STATEMENT

Respondent Rodale Inc. does not have a parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

In *Wisniewski v. Rodale, Inc.*, 510 F.3d 294 (3d Cir. 2007), the Third Circuit correctly applied this Court's well-developed jurisprudence to conclude that the federal Unordered Merchandise Act, 39 U.S.C. § 3009, does not provide for a private cause of action. Neither the language nor the structure of the statute, nor its legislative history, evince *any* congressional intent to create a private remedy for the statute. Instead, Congress explicitly entrusted enforcement to the Federal Trade Commission ("FTC").

Petitioner presents no compelling reason to review the Third Circuit's ruling, as Supreme Court Rule 10 requires. Petitioner asks this Court to grant the writ of certiorari for two reasons: First, Petitioner asserts that, in *Rodale*, the Third Circuit improperly construed this Court's governing test for determining implied private rights of action as articulated by *Alexander v. Sandoval*, 532 U.S. 275 (2001). (Pet. 6-12) Second, Petitioner contends that *Rodale* conflicts with the 31-year-old Ninth Circuit opinion, *Kipperman v. Academy Life Insurance Co.*, 554 F.2d 377 (9th Cir. 1977). (Pet. 5-6) Petitioner is wrong on both accounts.

The Third Circuit correctly applied *Sandoval*. In *Rodale*, just as *Sandoval* requires, the Third Circuit considered whether Section 3009 manifests congressional intent to create a private right and a private remedy. The Third Circuit concluded that Section 3009, which expressly confers enforcement authority upon the FTC, does *not* evidence

congressional intent to create a private remedy and therefore does not provide for an implied private cause of action. That conclusion is unassailable.

Indeed, despite Petitioner's claim, the *Rodale* court and other lower courts have shown *no* confusion in interpreting and applying *Sandoval*. Under *Sandoval*, courts may imply a private right of action only if the statute evinces congressional intent not only to confer a private right, but also to provide a private remedy. *See Sandoval*, 532 U.S. at 286. *Sandoval* and its progeny are absolutely clear on the point, as are the courts – including *Rodale* – and commentators that have examined it. While Petitioner would have it otherwise, Petitioner has cited no authority endorsing his view that Congress's creation of private rights, standing alone, may give rise to a private cause of action. That is not the law.

Moreover, there is no conflict among the Circuit Courts of Appeals concerning whether Section 3009 provides for an implied private cause of action. *Kipperman* – the only other Court of Appeals opinion addressing the issue – predated *Sandoval* by over two decades and did not have the benefit of this Court's many intervening decisions. These later cases uniformly support the conclusion that Section 3009 does not provide for a private cause of action.

The petition should be denied.

COUNTERSTATEMENT OF THE CASE

Section 3009 of the Postal Reorganization Act, 39 U.S.C. § 3009, regulates the business practice of sending merchandise to consumers without their consent, *i.e.*, unordered merchandise. The statute provides that the recipient of unordered merchandise may treat the merchandise as a gift and prohibits the mailer of such merchandise to bill for it. *See id.* §§ 3009(b), (c). The statute expressly authorizes the FTC to enforce its provisions. *See id.* § 3009(a) (citing FTC Act, 15 U.S.C. § 45(a)(1)). The statute and its legislative history are silent about a private right of action. (App. 18a)

In this action, Petitioner alleged that Rodale's book club violated Section 3009. Petitioner argued that Section 3009 provides for an implied private right of action and authorizes a range of private remedies. The district court disagreed and entered summary judgment against Petitioner on the ground that Section 3009 does not provide an implied private right of action. The Third Circuit affirmed. The Third Circuit analyzed this Court's substantial jurisprudence regarding implied private rights of action and carefully parsed *Alexander v. Sandoval*, 532 U.S. 275 (2001), as well as *Transamerica Mortgage Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11 (1979), and other authorities. (App. 4a-10a) Applying *Sandoval*, the Third Circuit found that Section 3009 does not evidence congressional intent to create both a private right and a private remedy, and therefore held that the statute does not provide for a private right of action. (App. 10a-19a)

Rodale first considered whether Section 3009 confers cognizable "rights" on individuals. (App. 11a-12a) The Third Circuit concluded that the statute confers only one express private "right": the right to treat unordered merchandise as a gift, *i.e.*, the right to keep such merchandise without charge. (App. 11a (citing 39 U.S.C. § 3009(b)) The Third Circuit was doubtful that the remaining substantive provisions of Section 3009, which direct mailers to use "clear and conspicuous" labeling and forbid them from dunning recipients for unordered merchandise, confer additional private rights. (App. 11a-12a (citing 39 U.S.C. §§ 3009(b), (c)) The court then concluded that there was no evidence of congressional intent to create a private remedy to enforce the express right granted by Section 3009 or any of the statute's other provisions. (App. 12a-18a) The Third Circuit reasoned that the "text and structure" of Section 3009 demonstrate that Congress intended for the FTC, not private individuals, to enforce these provisions. (App. 13a-18a) The court also noted that no legislative history indicates otherwise. (App. 18a)

The Third Circuit analyzed and correctly applied the prevailing Supreme Court precedents to conclude that Section 3009 does not provide for an implied private cause of action. There is no need for further review.

REASONS FOR DENYING THE PETITION

The Court should deny the petition because it presents no "compelling reason" for review. *See* Sup. Ct. R. 10.

Rodale faithfully interpreted and applied *Sandoval's* analytical method for determining whether a federal statute provides for an implied private right of action. According to Petitioner, *Rodale* – and every single court and academic commentary – misreads *Sandoval.* Far from showing why review is necessary, Petitioner actually demonstrates that review is inappropriate: *Rodale* is consistent with every authority construing *Sandoval* and, in fact, with *Sandoval* itself.

Petitioner's attempt to manufacture a conflict among the Circuit Courts of Appeals is equally unavailing. A single 31-year-old opinion that long predated *Sandoval* and this Court's significant jurisprudence in the intervening years hardly demonstrates that, today, courts are or ever will be in disagreement about the availability of a private right of action under Section 3009.

Review is not warranted, and this Court should deny the petition.

I. THERE IS NO UNCERTAINTY IN INTERPRETING *SANDOVAL*

Petitioner cites no authority – whether lower court opinions or academic commentary – to support his baseless argument that *Rodale* and other courts have misread *Sandoval* to "establish a standard that effectively eliminates the doctrine of implied private rights of action." (Pet. 12)

The Third Circuit, in a thorough and thoughtful

analysis of Supreme Court jurisprudence, properly held that "the relevant inquiry for determining whether a private right of action exists appears to have two steps: (1) Did Congress intend to create a personal right? and (2) Did Congress intend to create a private remedy? Only if the answer to both of these questions is 'yes' may a court hold that an implied private right of action exists under a federal statute." (App. 10a)

Petitioner attacks *Rodale*'s analysis on two grounds. First, according to Petitioner, *Rodale* erroneously held that *Sandoval* requires a showing of congressional intent to confer both a private right and a private remedy. Second, Petitioner contends, other lower courts and commentators have similarly misread *Sandoval*. Neither argument has merit.

A. *Rodale* Correctly Interpreted And Applied This Court's Prevailing Rulings Concerning Implied Private Rights Of Action

Petitioner attacks *Rodale*, claiming that the Third Circuit misconstrued *Sandoval*. Petitioner is wrong.

According to Petitioner, the private right of action question in *Sandoval* hinged on whether the relevant "rights-creating language" appears in a regulation or the enabling statute: "The rights-creating language in *Sandoval* was insufficient because it appeared in a regulation, not the statute, and it created rights beyond those provided by the

statute." (Pet. 11) Petitioner misreads *Sandoval*.

Critically, *Sandoval* clarified that a private right of action will not be implied unless a statute both confers private rights *and* contemplates a private remedy. As this Court itself later explicitly held in *Gonzaga University v. Doe*, 536 U.S. 273 (2002): "[E]ven where a statute is phrased in explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent 'to create not just a private *right* but also a private *remedy*.'" *Id.* at 284 (emphasis in original) (quoting *Sandoval*, 532 U.S. at 286).

Petitioner's cramped reading of the opinion as applicable only to analysis of regulations (*see* Pet. 12-13) has no support in *Sandoval* whatsoever. In fact, Petitioner's authorities uniformly recognize that *Sandoval* modified earlier implied private right of action jurisprudence in *all* cases and, most importantly, clarified that the Court has abandoned the preeminence of the private right of action test articulated in *Cort v. Ash*, 422 U.S. 68 (1975). (This Court's recent opinions on this issue, including last Term's *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, __ U.S. __, 128 S. Ct. 761 (2008), are discussed below.)

This Court too consistently has recognized that *Sandoval* distilled what already was evident in the opinions following *Cort v. Ash*: that the Court had "abandoned" its earlier jurisprudence and has "repeatedly declined to 'revert' to the 'understanding of private causes of action that held

sway 40 years ago.'" *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 67 n.3 (2001) (quoting *Sandoval*, 532 U.S. at 287).

As recently as last Term, this Court reaffirmed that courts should be wary of implying private rights of action and that, when considering whether to do so, congressional intent to create a private remedy is paramount. *See Stoneridge*, 128 S. Ct. at 773 (refusing to expand implied private rights of action under § 10(b) of the Securities and Exchange Act and noting that "determination of who can seek a remedy has significant consequences for the reach of federal power"); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) ("[T]his Court has recently and repeatedly said that a decision to create a private right of action is one better left to legislative judgment in the great majority of cases. . . . The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement [of the Alien Tort Statute] without the check imposed by prosecutorial discretion.") (citations omitted).

But none of this means, as Petitioner suggests, *Sandoval* or *Rodale*'s interpretation and application of it "*eliminate[s]* implied rights of action all together." (Pet. 12 (emphasis in original)) Rather, as this Court recently made clear, in proper circumstances, courts still should find implied private rights of action. Thus, this Court recently held that a victim of retaliatory discrimination has an implied private right of action under Title IX of

the Education Amendments of 1972, Pub. L. No. 92-381, 86 Stat. 373 (codified as amended at 20 U.S.C. § 1681 *et seq.*). *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 177-84 (2005). Notably, *Jackson*'s analytic framework is similar to *Rodale*'s. First, *Jackson* found that Title IX confers the private "right" to be free of retaliation. *Id.* at 174-78. But that was not the end of the analysis. Instead, *Jackson* proceeded to *Sandoval*'s next step and separately concluded that Title IX contemplates private enforcement by victims of retaliation. *See id.* at 179-84. As *Jackson* shows, Petitioner's fear – that all implied private rights of action will wither in the face of proper application of *Sandoval* – is unfounded.

Rodale followed *Sandoval*'s mandate that "'[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.'" (App. 9a (quoting *Sandoval*, 532 U.S. at 286)) *Rodale* analyzed the text and structure of Section 3009, as well its legislative history, to determine whether there was congressional intent to create a private right *and* a private remedy. (App 11a-19a) There is nothing revolutionary or improper in the opinion, and nothing warranting this Court's review.

B. Petitioner Concedes That *Rodale* Comports With All Other Judicial And Academic Analyses

Petitioner's belief that private right of action analysis begins and ends with a finding that a

statute includes "rights creating" language contradicts *Sandoval*, and no court or academic has adopted that view. In the face of that legal landscape, Petitioner opines that other lower courts, as well as academics, have misread *Sandoval* in the same way as *Rodale*, and that review is therefore appropriate. But the fact that courts and academics consistently (and correctly) interpret this Court's current jurisprudence is no basis for review. Petitioner would like the Court to believe that he is the only one who recognizes *Sandoval*'s true import. (Pet. 12-13) In truth, he apparently is the only one with difficulty understanding *Sandoval*.

This Court has settled the contours of its private right of action jurisprudence, and *Rodale* correctly interpreted and applied that law. There is no basis for review.

II. *RODALE* DOES NOT CONFLICT WITH ANY AUTHORITY – INCLUDING THE 31-YEAR-OLD NINTH CIRCUIT *KIPPERMAN* OPINION

Petitioner also argues that review is proper because *Rodale* supposedly conflicts with the Ninth Circuit's interpretation of Section 3009 in an opinion that predates *Sandoval* by 24 years. (Pet. 5-6 (citing *Kipperman v. Academy Life Ins. Co.*, 554 F.2d 377 (9th Cir. 1977)) Petitioner's reasoning is flawed.

Kipperman's implied private right of action analysis was undertaken in a decidedly pre-

Sandoval world. Critically, despite finding an implied private cause of action, *Kipperman* explicitly found that Congress *never* considered whether Section 3009 would confer a private right of action, let alone that Congress *intended* to create one. 554 F.2d at 380. *Kipperman* explained that Congress had no need to consider the issue because "[i]n the usual situation the remedy provided by the recipient is immediate and self-executing. . . . [T]he automaticity of the remedy provided by Congress in the usual situation goes far to explain why it neither explicitly permitted nor barred private suits under section 3009." *Id.* Nonetheless, *Kipperman* found a limited implied private right of action for declaratory relief because that type of action "would be entirely consistent with the purpose of the statute." *Id.*

Time and the inexorable march of this Court's more recent decisions have passed *Kipperman* by. It does not create a split of authority among the Circuit Courts of Appeals, and cannot present a basis for review of the Third Circuit's opinion in *Rodale*.

CONCLUSION

The Third Circuit properly interpreted and applied this Court's test for discerning whether a federal statute authorizes an implied private right of action. There is no need for the Court to revisit this issue. This Court should deny the petition for writ of certiorari.

RESPECTFULLY
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No. 07-1350

IN THE

Supreme Court of the United States

DAVID WISNIEWSKI, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PETITIONER

v.

RODALE, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF

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As set forth in Petitioner's opening brief, the *Rodale* decision represents, for the first time, a formulation of the standard for determining implication of a private cause of action that does not consider a statute's right-creating language as evidence of Congress's intent to create a private remedy. No prior Supreme Court precedent supports this view, the practical result of which is to render finding sufficient evidence of intent an impossibility.

Unable to refute the Third Circuit's sharp departure from settled law and the broad significance of this holding, Respondent mischaracterizes Petitioner's argument: "[A]ccording to Petitioner, *Rodale* erroneously held that Sandoval requires a showing of congressional intent to confer both a private right and a private remedy." (Resp. Br. at 6). Thus, much of Respondent's opposition brief is devoted to responding to an argument that Petitioner never made.[1] (*See* Pet. at 8-9).

The issue here is not, as Rodale asserts, whether there must be evidence of intent to create both a private right and a private remedy, i.e. a private cause of action, but rather *what type of evidence may demonstrate such intent.* This Court has long held that individually focused, right-creating language in a statute, as in § 3009(b) here, is generally "the most accurate indicator of the propriety of a implication of a *cause of action.*" *Cannon v. University of Chicago*, 441 U.S. 677, 692 n.13 (1979) (emphasis added). *See* Pet. 6-12. As Petitioner pointed out, this Court, in *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11,

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[1] *See also*, Resp. Br. at 9 (mischaracterizing Petitioner as asserting that the analysis for a private right of action "begins and ends with a finding that a statute includes 'rights creating' language.").

18 (1979), held that this type of statutory language may itself imply intent to create a private remedy. *See* Pet. at 7-8. Further, *Rodale's* interpretation of this Court's *Sandoval* decision is plainly wrong as *Sandoval* cited *Transamerica* as authority for the very proposition being distorted here. *See* Pet. at 11.

Simply put, there is no authority to support *Rodale's* standard for determining implied private right of action that limits the significance of right-creating language in a statute to only the question of whether Congress intended to create private rights, and that gives it no weight on the question of Congress's intent to create a private remedy. Moreover, despite Respondent's attempts to downplay the importance of the decision, the significance of *Rodale's* analytical framework as a new precedent is enormous.

Petitioner submits that there is no evidence that could meet the *Rodale* standard. Indeed, indications of Congress's intent other than the explicit language it chose to use in enacting a statute will necessarily be less compelling, especially when reviewed in isolation and not as a complement to such language. For example, where legislative history might provide some evidence that Congress considered the question of private enforceability of a statute, the lack of an express right of action will be found to be evidence that Congress must have ultimately decided against a private right of action. Likewise, where the legislative history is silent on the question, opponents will argue, as Respondents do here, there must have been no intent.[2]

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[2] In the wake of the *Rodale* Opinion, at least one district court has already applied its new standard, and found against a private right

Just as the Third Circuit held that § 3009(b)'s express creation of private rights showed only that Congress intended to create private rights, the *Rodale* analysis appears to require nothing short of an express creation of a private remedy in order to sufficiently demonstrate Congress's intent to create one.

Respondent downplays *Rodale* as unremarkable and asserts that there is no split in authority on whether there is an implied right of action under §3009 because the analysis in *Kipperman v. Academy Life Ins. Co.*, 554 F.2d 337 (9th Cir. 1977) "was undertaken in a decidedly pre-*Sandoval* world." Resp. Br. at 10-11. Respondent argues that a statement in *Kipperman* that Congress did not appear to consider the issue of intent to create a private cause of action makes the Ninth Circuit's conclusion impossible after *Sandoval*.

First, this argument fails to acknowledge that the issue is one of *implied* intent; it is not necessary that Congress "actually had in mind the creation of a private cause of action. The implied cause of action doctrine would be a virtual dead letter were it limited to correcting drafting errors when Congress simply forgot to codify its evident intention to provide a cause

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of action without considering the statute's right creating language as evidence of Congressional intent to create a private remedy. *Byers, et al. v. Intuit, Inc., et al.*, --- F.Supp.2d ---, 2008 WL 2217684 at *22 (E.D. Pa., May 28, 2008). Petitioner does not take any position on whether the Act in question in *Byers* (the Independent Offices Appropriations Act, 31 U.S.C. §9701 *et seq.*) should be construed to provide a private right of action. What is significant however, is the fact that in making the determination, expressly relying on the *Rodale* decision, the court did not consider the statute's rights creating language in determining the question of legislative intent to create a private remedy.

of action." *Thompson v. Thompson*, 484 U.S. 174, 179 (1988).

Further, recent cases undermine Respondent's claim of no split on this issue. A district court in the Ninth Circuit recently disagreed with *Rodale* and found that *Kipperman* is still good law. *UMG Recordings, Inc. v. Augusto, et. al.*, 558 F.Supp.2d 1055, 1064 (C.D. Cal., June 10, 2008). Likewise, last year the Ninth Circuit affirmed the validity of *Kipperman*. *Linder v. Reader's Digest Ass'n., Inc.*, 231 Fed.Appx. 663, 664 (9th Cir. 2007).

While the doctrine of implied private rights of action has been narrowed over the last thirty years, the *Rodale* standard does away with it altogether. To reach *Rodale's* conclusion, one must accept the illogic that Congress intended to create private rights for recipients of unsolicited merchandise, sought to insure that they not suffer financially from an unconscionable scheme, took the time and effort to enact a statute to create those rights in recipients for that purpose, and at the same time intended that such rights be ultimately meaningless as there would be no enforcement mechanism anywhere.

If there is still to be a doctrine of implied private rights of action at all, however narrowly construed, then *Rodale* must be reversed and this Petition should be granted.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted.

Respectfully submitted,

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